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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

NO. 173.

UNITED STATES OF AMERICA ex rel. MORRIS L. MARCUS and MORRIS L. MARCUS in his own behalf, Petitioners,

v.

WILLIAM F. HESS et al., Respondents.

BRIEF FOR RESPONDENTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

WILLIAM H. ECKERT,
EUGENE B. STRASSBURGER,
JOHN B. NICKLAS, JR.,
Counsel for Respondents.

1025 Union Trust Building,
Pittsburgh, Pennsylvania.

SMITH BROS., INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

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OPINIONS BELOW.

The opinion of the District Court is reported in 41 F. Supp. 197. The opinion of the Circuit Court of Appeals is reported in 127 F. (2d) 233.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938.

COUNTER-STATEMENT OF THE CASE.

This is a *qui tam* action brought under R. S. §§ 3490-3494[1] by a so-called informer, who simply copied the Government's indictment to which the respondents had already pleaded *nolo contendere* and on which the respondents have been fined and have paid their fines (R. 294-329).

Between 1935 and 1939, inclusive, various cities, boroughs, school districts and other local municipalities in Allegheny County, Pennsylvania, being in need of new public buildings or works, such as schools and recreational facilities, caused plans and estimates of the cost of such improvements to be made by architects or engineers hired by them and then applied to the Federal Emergency Administration of Public Works (hereinafter referred to as "PWA") for a grant, or loan and grant, to help finance construction of the project (R. 82). In the instances here involved, PWA responded with an offer of 30% or 45% of the actual cost, not exceeding, however, a specified sum. The latter figure was either 30% or 45%, as the case might be, of the estimated total cost (R. 48, 109-110, Tr.[2] 60-61, 196, 203). There was a maximum limit in dollars and cents contained in every PWA offer (Tr. 64). It was stipulated that for each of the projects involved there was an offer of a grant from the PWA and an acceptance by the local municipality (R. 116-117). Each offer from the PWA was addressed to a local municipality and the grant was expressly to the local municipality. The gist of the offers from the PWA was in the following form:

> "Subject to the Terms and Conditions (PWA Form No. 230, as amended to the date of this Offer),

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1. These sections are printed in the Record (R. 407-408).

2. In this brief "R." refers to the printed Record. "Tr." refers to the certified record on appeal.

which are made a part hereof, the United States of America hereby offers to aid in financing the construction of a school building, including necessary equipment, the acquisition of necessary land, and the improvement of the grounds (all herein called the "Project"), by making a grant to School District of the City of Pittsburgh, Allegheny County, Pennsylvania (herein called the "Applicant"), in the amount of 45 percent of the cost of the Project upon completion, as determined by the Federal Emergency Administrator of Public Works (herein called the "Administrator"), but not to exceed, in any event, the sum of $139,108."

A sample of one of said offers from the PWA is printed in the Record (Ex. 76, R. 179-180). The sample offer printed is an amendatory one; the original offers were identical, except that they did not contain the paragraph numbered 4. All of the provisions of PWA Form 230 which could possibly be considered relevant to the issues in this case are also in the printed Record (Ex. 22, R. 157-179). The PWA offer was accepted by resolution of the local municipality, and said offer and acceptance constituted the contract between the Federal Government and the local municipality (Tr. 7-8, 30, 33, 52-53, 123-125).

After the contract between the PWA and the local municipality had been made, the local municipality advertised for bids on the work (R. 43-44, Tr. 204, 262). Although these advertisements disclosed that a PWA project was involved, the advertisements were distinctly by the local municipality and solicited bids solely to the local municipality. A copy of the advertisement was included in the contract between the local municipality and the contractor. A sample advertisement is contained in the copy of the contract which is printed in the Record (Ex. 566, R. 217-218).

The respondent electrical contractors, on fifty-six of the projects listed in the complaint according to the jury, bid collusively. The respondents divided themselves into four brackets, each bracket to handle jobs within a certain price range. Each contractor chose his own bracket and could change from one to another (Tr. 1805, 1809). At first the members of the bracket into which the job in question fell would meet together with Carmack, the Manager of the Electrical Contractors Association, average the amount which each one had estimated the job would cost, and the one whose estimate was nearest the average would be made the successful bidder by all of the others who had been lower than him raising their bids above his (Tr. 897, 1875). Subsequently this plan was modified to the extent that, instead of meeting together, each interested contractor reported his estimated cost of the job to Carmack, who averaged those estimates and then told each contractor how much he should bid, Carmack so regulating the amounts that the contractor who had the least volume of prior work would be the successful bidder at the average price determined as above (Tr. 900-901, 1809, 1875). The contractors were forced to comply by the denial through the labor union of labor to perform their contracts and by sabotage on their work (Tr. 1542-1543). The "volume penalty" referred to by petitioner was very seldom used; petitioner's witness testified "there wasn't more than four or five" (Tr. 1964). The above bidding plans did not apply to the many cases in which an owner who wanted electrical work done would call one particular contractor and award the contract to him without soliciting bids (Tr. 2226-2227).

The bids or proposals of the respondents were addressed solely to the local municipality (R. 225). In most cases, but not always, the bid was accompanied by a certificate or affidavit that there had been no collusion in the bidding. No certificate or affidavit of non-collusion

was required by the contract between the PWA and the local municipality (Ex. 22 and 76, R. 157-184). When required by the local municipality they were, in many instances at least, kept by the local municipality and not submitted to the PWA (R. 49, 51-52, Tr. 47, 57). The petitioner is in error in stating in his brief (p. 13) that "the government later demanded that affidavits—rather than mere certificates of non-collusion—be furnished by the contractors (Tr. 427)." No Government contract or regulation requiring an affidavit, or any other kind of statement of non-collusion, is in evidence or exists to our knowledge. The testimony referred to is simply that certain employees of the City of Pittsburgh were "advised" to obtain affidavits "after the first trial came up", meaning the grand jury hearing in November, 1939 (R. 51). The latest City of Pittsburgh contract involved in this case was made on August 7, 1939 (Ex. 580), and neither it, nor any other contract in this case, requires a non-collusion affidavit, but it merely reserves to the City the option to call for such an affidavit, as follows: "The City reserves the right before any award of the contract is made, to require of any bidder to whom it may make an award of the principal contract a non-collusion affidavit" (Ex. 580, p. 7). The fact is as testified by petitioner's only witness who was examined on the question: "It was left entirely in our [the municipality's] hands whether we would employ them or not" (R. 49). When non-collusion affidavits were taken they were retained by the local municipality in its own files and not submitted to the PWA (R. 52). A form of bid or proposal is contained in the contract printed in the Record (Ex. 566, R. 225-226).

The contracts for performance of the work were awarded by resolution of the local municipality (R. 80, 106). A sample of one such resolution is printed in the Record (Ex. 169, R. 196-198).

The maximum limitation upon the amount of the PWA grant to the local municipality was not increased because of the amount of the contracts subsequently entered into by the municipality for the actual construction of the improvement (R. 83, 87-89, 92-93, 101-102). Thus, in the case of the Snowden Township School, the School District received only $23,727 from the PWA (R. 102), which was 45% of the originally estimated cost of the school of $52,727 (Tr. 294). The actual cost of the school, however, was $62,633.15 (Tr. 297), 45% of which actual cost is $28,184.92.

The contracts for doing the electrical and other work are solely between the local municipality and the contractor who is to do the work (R. 42-43). They are strictly two-party contracts. Neither the United States Government nor any officer, department, agency or instrumentality of it is any party to any of those contracts. In order that there may be no doubt about this, the contracts for all of the projects which were left in the suit at the conclusion of the evidence are included in the record on appeal. The relevant parts of one of the City of Pittsburgh contracts is printed in the Record (Ex. 566, R. 217-292). The heart of this agreement is parallel to the "agreement" portion of all of the other contracts and reads as follows (R. 274-276):

"THIS AGREEMENT

MADE the Oct 8 1938 day of ....., in the year 1938, by and between **John W. Craig**, d/b/a John W. Craig Electric Company, of 726 Herschel St., Pittsburgh, Pa. hereinafter called the 'Contractor,'

and

City of Pittsburgh, a municipal corporation of the State of Pennsylvania, acting in this behalf through Cornelius D. Scully Mayor, and Frank M. Roessing Director of the Department of Public Works of said

City, they having been duly authorized thereto by Ordinance of the Council of said City, hereinafter called the 'City';

WITNESSETH:

ARTICLE 1. SCOPE OF WORK.

The Contractor shall furnish all of the materials and perform all of the work shown on the drawings and described in the specifications, entitled —Construction of a Bath House and Swimming Pool at Burgwin Playground. Contract No. 4—Electrical—and shall do everything required by this Agreement and the contract documents.

ARTICLE 2. TIME OF COMPLETION.

The work to be performed under this contract shall be commenced when ordered by the Director, and shall be fully completed within One Hundred Twenty (120) consecutive calendar days from and including the date the General Contract is countersigned by the City Controller.

ARTICLE 3. THE CONTRACT SUM.

The City shall pay the contractor for the performance of the contract, subject to additions and deductions provided therein, in current funds as follows: Four Thousand Eight hundred seventy dollars ($4,870.00).

. . . . . ."

The contract (Ex. 566) is signed solely by the electrical contractor, John W. Craig, and various officials of and for the City of Pittsburgh (R. 276). Each of the contracts for all of the other projects in question is similarly executed only by an electrical contractor and a local municipality.

After the contracts for the doing of the work were entered into, they were submitted to the regional direc-

tor of the PWA and came back with a qualified approval stamped thereon in substance as follows (R. 51, 217, Tr. 10, 142, 341):

"Approved as to conformity with Agreement between the Applicant and the United States of America."

The contractor was notified by the local municipality when to start work. A letter from the Hampton Township School District to the Carter Electric Company to that effect is printed in the Record as an illustration (Ex. 301, R. 216).

The immediate and final direction and control of the work as it progressed was exercised by the local municipality, though the PWA had a "resident engineer inspector" who inspected the job from time to time (R. 52, 68-69, 72-74, 77-79, 80-81, 86-87, 91-92, 93-95, 97-98, 101-103, 108, 110-111, 113). The local municipality was represented by its architect or engineer, or an employee of the architect or engineer, who was on the job most, if not all, of the time, and a "clerk of the works" (who was generally a former contractor), who was always on the job. Sometimes also the local municipality would appoint a committee of its officials, who kept in close touch with the work, and took a leading part in the matter of changes in the plans (R. 83-84). The PWA's representative inspected the work an hour or so a day; he had several projects under his inspection at the same time. The final acceptance of the work after its completion was by the local municipality (R. 115, 116).

Each payment to every contractor was made by the local municipality which had contracted with him, by check or draft signed solely by officials of the local municipality, drawn on bank accounts which were subject to check only by officials of the local municipality and not by the PWA or any officer of it (R. 44, 45-46, 57-58, 60-68, 70, 74, 76, 81, 85, 89-90, 95-98, 100-101, 103-104, 106-108, 114). Each bank account was in the name

of the local municipality, with some such designation as "construction account" to differentiate it from other accounts of the local municipality. The bank accounts were occasionally audited by the PWA (R. 107). A sample of one of the checks used in paying a contractor is printed in the Record (Ex. 213, R. 201). These payments were made by the local municipality upon presentment to its secretary, treasurer or other proper authority of monthly estimates of the work done and materials furnished during the preceding month (R. 48-49, 66, 68, 70, 76, 79, 85, 90, 92, 95, 97, 100, 104 [stipulation], 105-106, 108, 112, 118-120). Sometimes the governing body of the local municipality passed a separate motion or resolution directing the payment by the disbursing officer of the municipality of each monthly estimate as it was presented (R. 76, 79-80, 85, 96, 99, 108, 112, 114, 115-116). These monthly estimates were usually on PWA Form I-23, one of which (part of Ex. 245) is printed in the Record as a sample (R. 202-207). Contrary to the statement in petitioner's brief (p. 16) that "the approval of the federal officers was the last step necessary" for the release of funds from the construction account to the respondents, the last step was the resolution or other action of the governing body of the local municipality directing its disbursing officer to write the municipality's check and deliver it to the contractor, which is demonstrated by the fact that on various of the involved projects the local municipality is withholding part of the contract price from the contractor notwithstanding that the municipality has received the full amount of the agreed grant from the PWA (Tr. 667, 671).

The City of Pittsburgh, in addition to the monthly estimate on the I-23 form, also caused a "Current Estimate" signed only by various city engineers and officials and a "Departmental Invoice" also signed only by certain city officials to be presented by the city Department

of Public Works to the City Controller, who actually drew the checks and paid the contractors (R. 57-59, and see Ex. 107, R. 185-194).

The receipts for the payments, where receipts were taken, acknowledge receipt of payment exclusively from the local municipality (Ex. 264, R. 209). When the final payment was made the contractor gave a release, which ran solely to the local municipality, and a certificate that all persons who had supplied labor or material for him on the job had been paid in full by him, which certificate also was addressed solely to the local municipality (Ex. 190, R. 198-200).

The funds in the aforesaid construction account were obtained by the local municipality by the sale of its bonds, from its general funds, in one case by collection of fire insurance on a burned building of the municipality and by the grants from the PWA (R. 72). The checks for the PWA grants were payable to the local municipality, were sent to the local municipality, and were deposited by the treasurer or other official of the local municipality in the aforesaid account in the name of the municipality and subject to check only by the municipality (R. 46, 66, 67 [stipulation], 74-76). As provided in sections 1, 3 and 4 of Part II of PWA Form 230 (Ex. 22, R. 160-163), the PWA grant was paid to the municipality in four installments. Sometimes the local municipality paid the contractor before it had any money on hand from the PWA, and all of the contractors had to be paid in full by the local municipality before the final 10% of the PWA grant would be paid to the municipality (R. 53, 55, 112-113).

The periodical estimates for partial and final payment on the I-23 forms were generally handled as follows (R. 118-120). Near the end of each month the contractor, a representative of the local municipality and the PWA inspector would go over the job together

and agree how much work had been done during that month, or, in other words, what should be put on the periodical estimate (the I-23 form) for that month. The contractor would then prepare the monthly estimate in accordance with what had been agreed upon and present it to the architect, engineer or other representative of the local municipality. After the representative of the local municipality had noted his approval on the estimate, he would hand it to the PWA inspector. The PWA inspector would then sign the form under the certificate intended for him, but would sometimes except certain items from his certification, as is true on the I-23 form printed in the Record (Ex. 245, R. 207). The periodical estimate was finally delivered to and retained by the local municipality, which then proceeded to pay the contractor as already described.

The local municipality could, if it wished, pay the contractor the full amount of the estimate notwithstanding some qualification or exception to the certification of the PWA inspector thereon (R. 62), and having authorized the work to be done was bound to pay for it whether the PWA approved it or not (R. 108-109). In fact the local municipalities repeatedly actually did pay the contractor the full amount of a periodical estimate, notwithstanding that the PWA inspector had excepted one or more items thereon from his certification (R. 101, 108-109, Tr. 64-65). An instance of this kind is shown by the periodical estimate (I-23 form) which is printed in the Record (R. 202-207) and the warrant or draft of the West View School District in payment of that periodical estimate (R. 208, both parts of Ex. 245). Under the heading "Remarks" at the end of this periodical estimate, it will be seen that the PWA inspector expressly excepted one item from his certification because it entailed a change which had not been approved by the PWA (R. 207). Nevertheless, the School Board's draft

was for $1,562.39, the same amount as the total shown due by said periodical estimate (R. 205, 208).

The periodical estimates on the projects of Allegheny County were handled a little differently. It appears that the County's resident engineer on each project estimated the amount of work done each month, made up the periodical estimate, had it signed by the contractor and the PWA inspector and then caused it to be presented by the County Department of Public Works to the County Controller, who then paid the contractor (R. 40-41, 44, 52-53).

The excerpt from the opinion of the trial judge which is quoted in petitioner's brief (p. 14) contains, we respectfully submit, the following errors: (1) The estimates on the I-23 forms were not submitted by the contractor to the Administrator. They were submitted by the contractor to the architect, engineer or other representative of the local municipality, and the latter, after he had approved the estimates, submitted them to the PWA inspector, who, after making his notations thereon, returned the estimates to the local municipality (R. 118-120). (2) The periodical estimates on the I-23 forms were never approved by the Administrator, meaning the Federal Relief Administrator of Public Works, but only by a PWA "resident engineer inspector." (3) Payments could be and were made from the construction account without the approval of the Administrator, either on the I-23 forms or elsewhere (R. 62, 101, 108-109, Ex. 245, R. 205, 207, 208). (4) The estimates on the I-23 forms were never sworn to. (5) The bank in which the construction account was placed was never approved by the Administrator; the only requirement in this respect was that contained in PWA Form 230, Part II, p. 5, which specified that the construction account should be kept in a bank which was a member of the Federal Deposit Insurance Corporation (Ex. 22, R. 163).

If changes or additions were desired to the plans after the contract for the grant had been made, such changes or additions were decided upon by resolution of the governing body of the local municipality (R. 84 and see the resolution portion of Ex. 151 included in the certified record). All changes and additions were reported to the regional director of the PWA, who replied on PWA Form 84, approving or disapproving the change. A sample of this Form 84 is included in the certified record on appeal (the first sheet of Ex. 151). Form 84 contains the following paragraph:

> "The Public Works Administration, in approving any change, assumes no obligation to finance the cost thereof, except to the extent to which the same may be paid out of funds expressly contracted for by it, and specifically makes no representation concerning any additional funds necessitated by any approved change."

In fact, so far as the record shows, the PWA did not contribute toward the cost of any changes or additions (R. 70, 80). The order to the contractor for any changes or additions came exclusively from the local municipality (see the copy of one such change order from the Pittsburgh Board of Education to the Morganstern Electric Co., being the first part of Ex. 297, included in the certified record).

At the conclusion of a project the PWA sent its Form 290 to the local municipality, being a recapitulation of the agreed amount of the grant, the sum which had actually been paid by the PWA to the municipality, and an explanation of any discrepancy. One such form is printed in the Record (Ex. 265, R. 211-215). This particular Form 290 shows that part of the agreed grant had been suspended from payment by the PWA "pending action by the Owner regarding collusive bidding on this contract", referring to the electrical contract (R.

215). The "owner" refers to the local municipality. Similar statements appeared on other communications from the PWA explaining suspensions on grant payments (R. 47-51, and see Ex. 150, R. 195).

At the trial there were offered in evidence the records of the District Court at No. 10462 Criminal to No. 10498 Criminal, both inclusive, for the purpose of showing that the respondents had already been criminally punished for the same acts upon which the instant suit is predicated (R. 126-127). At No. 10462 Criminal all of the respondents in the instant action had been indicted under § 37 of the Criminal Code (18 USCA § 88) for conspiring to defraud the United States. A copy of this indictment is printed in the Record (R. 301-322). At No. 10463 to No. 10498, inclusive, each of the respondents, except respondents Ridinger, Sr., and Jr., Bickford, Iron City Engineering Co., Walter and Murray, was separately indicted under § 35 of the Criminal Code as amended in 1934 (18 USCA, 1940 Pocket Part, § 80) for making false certificates or affidavits of non-collusion in bidding on the same projects which are embraced in the prosecution at No. 10462 Criminal and in the instant action. A copy of the indictment at No. 10463 Criminal is also printed in the Record (R. 323-329). The indictments at the subsequent numbers were the same as that at No. 10463 Criminal except as to the names of the defendants and of the jobs. The respondents Ridinger, Sr., and Jr., Bickford and Iron City Engineering Co. were not indicted for making any false certificates or affidavits of non-collusion because in fact neither they nor anyone in or for their company ever made any. The respondents all pleaded *nolo contendere* to the indictment at No. 10462 Criminal, were sentenced by the court to pay fines and have paid the fines imposed upon them, respectively. The other indictments were *nol. prossed*. The relevant docket entries to show the dis-

position of those criminal proceedings are printed in the Record (R. 294-300, 322).

M. Neil Andrews, Esq., took the witness stand for the respondents and an offer was made to prove by him that he was a Special Assistant to the Attorney General of the United States; that as such he was in charge for the Government of the criminal prosecutions against the respondents for the conspiracy in bidding for the electrical work on the same PWA projects that are involved in this suit, and the making of false certificates and affidavits of non-collusion in connection with those projects, which offenses were the subject of the indictments at No. 10462 Criminal to No. 10498 Criminal in the District Court; that as the representative of the Government he agreed with the respondents in this case as to the disposition of those criminal proceedings, and that said agreement was that if the respondents would plead *nolo contendere* to the indictment at No. 10462 Criminal the Government would be satisfied with whatever punishment the court imposed in that case as being also in complete satisfaction of all criminal liability of the respondents on all of the indictments, both for the conspiracy and the false certificates and affidavits of non-collusion which were the subject matter of the indictments at No. 10463 to No. 10498 Criminal, both inclusive, and that as a matter of convenience, the entire punishment or fines would be imposed at No. 10462, and the indictments at No. 10463 to No. 10498, both inclusive, would be *nol. prossed* (R. 125-126). This offer was excluded (R. 126).

The respondents also offered to prove the actual cost of doing each one of the projects by competent witnesses who were familiar with what those jobs actually cost, and to follow that evidence with other evidence to prove that the actual cost of doing the jobs was fair and reasonable and the lowest price at which the respec-

tive jobs could be done (R. 120-123). All of these offers were rejected.

The respondents also offered to prove by qualified witnesses that their reputations for honesty, fair dealing, integrity and law abidance were very good (R. 123-124). This evidence was also excluded.

In his closing address to the jury, counsel for the relator in effect argued that because the respondents had pleaded *nolo contendere* in the prior criminal proceedings, the jury should find that they were also liable in the case at bar (R. 127-129). The respondents objected and asked for the withdrawal of a juror (R. 127-129). Relator's counsel attempted to justify his argument by reason of the fact that defense counsel in their opening to the jury had told them that the respondents expected to show that they had already been indicted, pleaded *nolo contendere* and been fined for the same offenses which were the basis of the present suit and, therefore, could not be subjected to further penalties or double damages for the same acts and in closing had explained to the jury that that evidence had not been introduced because it had been held incompetent, but asked the jury not to draw any inference that the respondents were liable in this case, because they had pleaded *nolo contendere* to indictments under different statutory provisions (R. 128). The motion to withdraw a juror was declined (R. 129). Counsel for the relator then resumed his argument to the jury that they should find the respondents, and particularly Ridinger, Sr., Bickford and Yates (as to whom it had been argued to the jury by their counsel that they had not been participants in the illegal bidding) liable in this case because they all had pleaded *nolo contendere* in the criminal case (R. 127-129). Again a motion to withdraw a juror and continue the case was made and refused (R. 129).

All of the respondents presented a joint and several written request for a directed verdict in their favor, setting forth the specific grounds therefor (R. 333-334). Each respondent also presented a separate written request for a directed verdict in his favor, incorporating the same grounds (R. 334). All of these requests were refused (R. 147, 334).

The jury returned a verdict against all of the defendants, except Carmack, the Manager of the Electrical Contractors Association, in the sum of $315,100.91, consisting of $203,100.91 damages (being double the actual damages found by the jury) and $112,000 penalties (R. 338).

In due time the respondents filed a joint and several motion that judgment be entered in their favor, in accordance with the motions which they presented at the trial for directed verdicts in their favor (R. 339). At the same time each respondent also filed a separate motion for judgment in his favor (R. 340). Also at the same time the respondents filed a motion in the alternative for a new trial, setting forth the specific reasons therefor (R. 341-346). The trial judge denied all of these motions (R. 387-389).

The respondents duly appealed to the Circuit Court of Appeals for the Third Circuit (R. 390-391). While the case was pending in the Circuit Court of Appeals the Government, through the Honorable Assistant Attorney General, Thurman Arnold, petitioned that Court for leave to file a brief as *amicus curiae* and to participate in the oral argument before that Court, which leave was granted (R. 467). In the Government's said petition and accompanying brief it asked that the judgment of the District Court "be reversed" and "that the action be dismissed" ("Petition on Behalf of United States for Leave to File Brief as Amicus Curiae" pp. 1-2, and "Brief on Behalf of the United States as Amicus Curiae" p. 15).

After full argument and consideration, the Circuit Court of Appeals reversed the judgment of the District Court and remanded the case to the latter for further proceeding in accordance with the Circuit Court's opinion (R. 485), which was simultaneously filed (R. 471), and certain clerical errors therein promptly corrected (R. 487). Upon petition of the relator, a certiorari was granted by this Court.

SUMMARY OF ARGUMENT.

I. (a) R. S. § 3490, upon which this action is based and which is to be construed strictly, imposes liability only for presenting a false "claim upon or against the Government of the United States, or any department or officer thereof." The respondents' contracts were exclusively with the local municipalities. Neither the United States Government nor any department or officer thereof ever promised to pay the respondents a cent for their work. The respondents, therefore, never had any "claim upon or against the Government of the United States, or any department or officer thereof", and consequently could not make or present any such claim for payment or approval.

(b) The statutory provisions upon which this action is based require a "false, fictitious or fraudulent claim", as a claim for payment for materials which, in fact, were never furnished. The respondents fully performed their contracts and their claims against the local municipalities for payment were, therefore, not false, fictitious or fraudulent.

II. The respondents have already been punished by fines in criminal proceedings for the same acts upon which the case at bar is founded. Penalties and double damages are sought to be recovered in the present action. To subject the respondents to penalties, forfeitures or double damages for the same offenses for which they have already been criminally punished is unlawful.

III. The sanction of the Commissioner of Internal Revenue and of the Attorney General is a condition precedent to the bringing and maintaining of such a suit as this. This suit was brought without the sanction of either.

IV. In view of the specific limitation in dollars and cents upon the amount which the PWA would grant to

the municipality on each project, it is impossible to tell from the evidence in this case how much, if anything, the Federal Government paid out because of the acts of the respondents which it would not have paid out in the absence of such acts. The burden is on the plaintiff to prove the damages. That burden was not fulfilled in this case.

V. If all of the above reasons were rejected, it is submitted that the respondents are entitled to a new trial for any one of the following three reasons:

(a) Respondents offered to prove the actual cost of doing the electrical work on the projects in question and that such costs were fair and reasonable and the lowest prices at which the work could be done in accordance with the respective contracts. All such evidence was excluded.

(b) Respondents also offered to prove by competent witnesses that their reputations for honesty, fair dealing and integrity and for being law-abiding citizens were very good. All such evidence was excluded. This action being in part to recover a penal sanction, character evidence should be admissible.

(c) Relator's counsel in his closing address to the jury argued that respondents' plea of nolo contendere in the criminal proceeding constituted an admission of their liability in the case at bar. The plea of nolo contendere may not be used as an implied admission of liability in a subsequent action. Respondents' motion to declare a mistrial was overruled.

VI. If all of the above reasons were rejected, it is submitted that the verdict, which included $112,000 by way of penalties, was excessive to the extent of $110,000, because only one penalty or forfeiture of $2,000 can be included in the recovery in any single case brought under R. S. § 3490.

ARGUMENT.

At the outset we wish it clearly understood that we are not condoning or seeking to palliate the collusive bidding in which any of the respondents engaged; and this regardless of considerable that might be said for them to show to what extent the bidding system was an outgrowth of NRA (which was outlawed on May 27, 1935), how the respondents were forced to comply, or that only a price reasonable to all interested parties was sought. We have always admitted that the proper respondents should make restitution for any actual damages inflicted, through voluntary negotiations with the local municipalities or suits brought by the local municipalities. Nor will we stand in the way of the Federal Government enforcing any legal right which it ever had to recover compensatory damages for any injury it has actually suffered. But what we do oppose is being mulcted for double damages and $112,000 in penalties in a suit unauthorized by law, brought by a private relator who informed the Government of nothing and who, other than referring incorrectly to the statutes under which he brought this action, simply copied the Government's public indictments to which the respondents had already pleaded *nolo contendere*.

Statutes Involved.

This action, as expressly averred in paragraph 1 of the complaint (R. 5), is specifically based upon §§ 3490-3494 of the Revised Statutes of the United States, adopted in 1874. Besides the official edition of the Revised Statutes, these sections may also be found in 2 Fed. Stat. Ann. pp. 208-210, and in 6 U. S. Comp. Stat. §§ 6411-6415. We do not refer to 31 USCA § 231 for R. S. § 3490, because as held in *Olson v. Mellon*, 4 F. Supp. 947, affirmed *sub nomine U. S. ex rel. Knight v. Mellon*, 71 F. (2d) 1021 (certiorari denied 293 U. S. 615),

R. S. § 3490 is not correctly copied in 31 USCA § 231 and the United States Code Annotated is a private publication which, as stated in its preface, does not have the force of law and was not intended to amend, enact or repeal any law. R. S. §§ 3490-3494 as copied from the official edition of the Revised Statutes are printed in the Record (R. 407-408). There have been no amendments to R. S. §§ 3490-3494 since the Revised Statutes were adopted in 1874.

R. S. § 3490 reads as follows:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

R. S. §§ 3491-3494 relate only to procedural subjects and give half of any recovery to relator (R. 407-408).

R. S. § 5438, which is incorporated into R. S. § 3490, began, at the time of the enactment of the Revised Statutes in 1874, as follows:

> "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining

or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

The portion of R. S. § 5438 omitted from the foregoing quotation relates to the misappropriation of military property of the United States. R. S. § 5438 is quoted in full in the Record (R. 409-410) as it read when the Revised Statutes were enacted.

Any further legislative history is material only to perceive the inapplicability of cases relied upon by the relator and the trial judge and certain arguments of the relator. All of the statutory provisions referred to above were derived from the Act of 1863, c. 67, 12 Stat. 696. That Act of 1863, however, was wholly repealed by R. S. § 5596. The Revised Statutes are more than a compilation—they are the law, except as parts thereof have been subsequently amended or repealed: *Dwight v. Merritt*, 140 U. S. 213, 217.

R. S. § 5438 was amended by the Act of May 30, 1908, c. 235, 35 Stat. 555, merely to reduce part of the criminal punishment, which is not material to this case. R. S. § 5438 was specifically and wholly repealed by § 341 of the Act of March 4, 1909, c. 321, known as the Criminal Code of 1909, 35 Stat. 1095, 1153, 1159. Section 35 of said Criminal Code of 1909 contained with slight variations the same language which had been in R. S.

§ 5438. Section 35 of the Criminal Code of 1909 was amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015, to include any corporation in which the United States is a stockholder and the falsifying or concealing of a material fact by any trick, scheme or device and the making of any false statement or representation for the purpose of cheating, swindling or defrauding the Government, or any department thereof, or any corporation in which it is a stockholder. The additions made to § 35 of the Criminal Code in 1918 are fully and clearly shown in the reprint of the Act of 1918 in the Record (R. 414-416). It is the parts of § 35 of the Criminal Code as amended in 1918 which constitute 18 USCA §§ 80 and 83, which are quoted in paragraph 6 of the relator's complaint, *but those are not the statutory provisions which are incorporated into R. S. § 3490.* By the Act of June 18, 1934, c. 587, 48 Stat. 996, § 35 of the Criminal Code was further amended by extending it to any misrepresentation in "any matter within the jurisdiction of any department or agency of the United States". The precise amendment is set forth in the Record (R. 416-418). *This 1934 amendment also is not incorporated into R. S. § 3490 and cannot be invoked to support the case at bar.* There was also a slight amendment made to § 35 of the Criminal Code by the Act of April 4, 1938, c. 69, 52 Stat. 197.

It is definitely settled that the so-called informer's act, R. S. § 3490, incorporates only R. S. § 5438 as the latter was enacted in 1874, and *not any of the amendments to § 5438 or to § 35 of the Criminal Code of 1909: Olson v. Mellon, supra.* It is also definitely settled that the informer's act, R. S. § 3490, does not incorporate 18 USCA § 80 and/or § 83, quoted in the complaint: *Olson v. Mellon, supra.* In accord are *U. S. v. Mercur Corp.*, 13 F. Supp. 742, 743, affirmed in 83 F. (2d) 178 (certiorari denied 299 U. S. 576) and *U. S. v. McMurtry*, 5 F. Supp. 515, 517.

I.

No Statutory Authorization for This Suit.

1. *Informers are not favored.*

In addition to the cases cited by the court below for the rule that *qui tam* actions are regarded with disfavor, Mr. Justice Brewer, when a Circuit Judge, said of an informer who brought a *qui tam* action in *Taft v. Stephens Lith. & Eng. Co.*, 38 Fed. 28, 29:

> "Plaintiff is not suing for the value of his services, or for injury to his property, but simply to make profit to himself out of the wrongs of others; and when a man comes in as an informer, and in that attitude alone asks to have a half million dollars put into his pocket, the courts will never strain a point to make his labors light, or his recovery easy."

2. *R. S. § 3490 is to be construed strictly.*

R. S. § 3490 is penal in nature and must, therefore, be strictly construed. To that effect in *Olson v. Mellon, supra*, Judge Gibson, whose opinion was adopted by the Circuit Court of Appeals and a certiorari refused by this Court, said (p. 949):

> "Counsel for the plaintiffs have contended that sections 3490, 3491, Rev. St., are remedial statutes, and, as such, are entitled to a quite liberal construction, as opposed to the strict construction to be given a penal statute. With this contention we are unable to agree. *The statute is plainly penal in its nature, and is not to be enlarged by implication;* and, unless it be so enlarged, no statutory authority exists for plaintiffs' suits." (Italics added)

In *U. S. ex rel. v. Kansas Pacific Ry. Co.*, 26 Fed. Cas. No. 15,506, the court said of R. S. § 3490 (p. 680):

"The law under which this suit is brought being a penal statute, it should not be enlarged by implication, but should be strictly construed."

Ferrett v. Atwill, 8 Fed. Cas. No. 4,747 (C. C., N. Y., 1846, Nelson, C. Justice, and Betts, D. J.), was an informers' suit brought by two men jointly for themselves and the United States to recover the statutory penalty for falsely impressing upon a musical composition that it had been copyrighted under an Act of Congress. The defendant's demurrer was sustained because two men, rather than only one, acted as relators. While this case is under a different informer's statute than the one under which the present suit is brought, it shows how strictly informer's statutes are construed. The court said (p. 1163):

"Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied. U. S. v. Sheldon, 2 Wheat. (15 U. S.) 119; Myers v. Foster, 6 Cow. 567; Daggett v. State, 4 Conn. 61. They sedulously limit the action of penal statutes to the precise cases described in them, and reject an interpretation tending to comprehend matters not named by the legislature, although analogous. The authorities cited are explicit to this point, and are in unison with numerous others, English and American. Cone v. Bowles, 1 Salk. 205; Reniger v. Fogossa, 1 Plowd. 17; Fleming v. Bailey, 5 East. 313.

"The privilege of claiming or enforcing a penalty is one of statutory appointment, and must be construed with like strictness."

Then after reviewing some cases which supported its decision, the court continued as follows (p. 1163):

"The plain language and sense of the statute under consideration, restrict the right of action to

a single person; and we should not be disposed, on general principles, to enlarge its operation, so as to encourage associations of individuals in instituting and conducting penal actions, the nature of those actions in our opinion exacting a rigorous adherence to the terms of the law."

The Circuit Court of Appeals for the Second Circuit in *U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co. et al.*, 11 U. S. Law Week 2396, on November 5, 1942, in affirming the dismissal of an action brought under R. S. § 3490, branded that statute as follows:

> "This would be the necessary result were the statute of the usual kind and entitled to a broad interpretation; but it is not, for it is not only penal, but *drastically penal.* [citing cases] For this reason it has been strictly construed. [citing cases] Furthermore, so far as it perpetuates the odious and happily nearly obsolete *qui tam* action, *it should be regarded with particular jealousy.*" (Italics added)

Other cases containing similar declarations regarding R. S. § 3490 are *U. S. v. Shapleigh*, 54 Fed. 126, 129-130, 134 (C. C. A. 8) and *Pooler v. U. S.*, 127 Fed. 519, 521 (C. C. A. 1).

Among the many cases which might be cited in support of the general doctrine that penal and criminal statutes should be strictly construed, the opinion of Chief Justice Marshall in *U. S. v. Wiltberger*, 5 Wheat. 76, 95, 96, the fairly recent opinion of this Court in *U. S. v. Scharton*, 285 U. S. 518, 521, and the language of Judge Dillon in *U. S. v. Clayton*, 25 Fed. Cas. No. 14,814, quoted in *Flora v. Rustad*, 8 F. (2d) 335 (C. C. A. 8), should suffice. The last is as follows (8 F. (2d) at 337):

> "'The doctrine is fundamental in English and American law, that there can be no constructive offenses; that before a man can be punished his

case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States. U. S. v. Morris, 14 Pet. (39 U. S.) 464 (10 L. Ed. 543); U. S. v. Wiltberger, 5 Wheat. (18 U. S.) 76 (5 L. Ed. 37); U. S. v. Sheldon, 2 Wheat. (15 U. S.) 119 (4 L. Ed. 199).'"

It should also be noted that R. S. § 3490 uses the words "forfeit" and "forfeiture" in defining what may be recovered under it (R. 407). These terms import punishment, are part of the terminology familiar in the criminal courts and are inconsistent with the recovery of mere compensatory damages. Indeed, the $2,000 "forfeiture" and the double damages are manifestly intended as punishment, go beyond mere reparation for actual injury, and are, therefore, penal in nature.

There can, of course, be no doubt about the criminal nature of R. S. § 5438. Both it and R. S. § 3490 should, therefore, we submit, be strictly construed and not extended by implication to cover situations which may appear to be analogous or equally culpable.

3. *This case is not within the first clause.*

Contrary to his course in the court below, the relator now contends that he has a cause of action under each of the first three clauses of R. S. § 5438, which is incorporated into R. S. § 3490, and divides his argument into a discussion under each of said clauses separately. Better to meet the relator's argument as now presented, we, therefore, will also consider each of those three clauses separately.

That the first clause of R. S. § 5438 requires as an essential element that the defendant present a false claim *"upon or against the Government of the United States"* is admitted in the petitioner's brief (p. 20) and is clear from the language of the statute.

The requirement that the claim must be "upon or against the Government of the United States" means that the claim must be based upon the Government's own liability to the claimant: *U. S. v. Cohn*, 270 U. S. 339. That was a criminal prosecution under § 35 of the Criminal Code for obtaining imported cigars out of a government custom house through fraudulent misrepresentations that the bill of lading had been lost, when in fact the defendant had not paid the draft which accompanied the bill of lading to a bank. A demurrer to the indictment was sustained and affirmed on appeal because the defendant's acts did not violate § 35, *i. e.*, defendant had not presented a false claim for payment against the Government. This Court said with reference to the statutory language which we are now considering (pp. 345-346):

> ". . . it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, *based upon the Government's own liability to the claimant.*" (Italics added)

In reading the opinion in the *Cohn* case it should be recalled that the "defrauding" of the Government referred to in the opinion was added to § 35 by the amendment of 1918, and was not included in R. S. § 5438.

Likewise, in *U. S. ex rel. v. Mercur Corp.*, 13 F. Supp. 742, the Honorable Robert P. Patterson, then a District Judge of the Southern District of New York, afterwards

a Circuit Judge and now Undersecretary of War, in dismissing an informer's complaint based on R. S. § 3490 because the suit was not within the purview of that section and the incorporated provisions of R. S. § 5438, said (p. 743):

> "An informer's action will therefore lie *only* in cases where the defendant has made false, fictitious, or fraudulent 'claim upon or against' the Government of the United States. This means a claim for money or property 'to which a right is asserted against the Government, based upon the Government's own liability to the claimant.'" (Italics added)

The Circuit Court of Appeals for the Second Circuit affirmed (83 F. (2d) 178) and this Court denied a certiorari: 299 U. S. 576.

Other cases to the same effect are *Olson v. Mellon, supra,* p. 948; *Mookini v. U. S.,* 95 F. (2d) 960, 961 (C. C. A. 9); *U. S. ex rel. v. Salant,* 41 F. Supp. 196, 197 (D. C., S. D. N. Y.); *U. S. ex rel. v. American Cotton Co-operative Ass'n.* (R. 433) (L. 58-272, D. C., S. D. N. Y.); *Salas v. U. S.,* 234 Fed. 842, 844-845 (C. C. A. 2); *U. S. v. McMurtry,* 5 F. Supp. 515, 516 (D. C., Ky.); and *Capone v. U. S.,* 51 F. (2d) 609, 614 (C. C. A. 7).

It being, therefore, established by all of the cases and it also appearing from consideration of the statutory language that in order to be liable under the first clause of R. S. § 5438 the defendant must have made a false *claim against the Government of the United States or some department or officer thereof,* it remains only to apply that law to the facts of the case at bar. The respondents had no contract with the Government of the United States, nor with any department or officer thereof. Neither the Government of the United States nor any department or officer thereof promised to pay the respondents anything for their electrical work. How then could the respondents have "any claim upon or

against the Government of the United States, or any department or officer thereof"?

It is not sufficient under the provisions of R. S. § 5438 that the defendants make or present claims for payment or approval to an officer in the civil, military or naval service of the United States, knowing such claims to be false, fictitious or fraudulent, *unless also those claims are "upon or against the Government of the United States, or any department or officer thereof." In the case at bar, the only claims which the respondents had and, therefore, could present, were against the local municipalities, which alone had promised or contracted to pay them* (R. 274). That the contracts with the respondent electrical contractors were simply two-party contracts between the local municipality, as one party, and the electrical contractor, as the other party, and that neither the United States of America nor any of its departments, officers or agencies was a party to said contracts, clearly appears from those contracts and is beyond dispute. (R. 274). The contracts are signed only by the electrical contractor and officers of the local municipality (R. 276). Incidentally, it may also be noted that the advertisement for bids was solely by the local municipality (R. 217-218), the bids were addressed exclusively to the local municipality (R. 225) and the performance bonds run alone to the local municipality (R. 277, 279). Everything is consistent with the whole liability for paying the contractor being solely on the local municipality.

Consequently it is immaterial whether the I-23 forms, *i. e.*, the periodical estimates for partial and final payment, had to be presented to and approved by a PWA resident engineer inspector before they were paid. At most the claim of the contractor was presented for approval *to* an officer in the service of the United States, but still the claim was not *against* such officer

or against the United States Government or any department thereof. R. S. § 5438 requires *both* the presentment of the claim to a person or officer in the service of the United States *and* that the claim must be against the Federal Government or a department or officer thereof. It is not merely a question of *to whom* something is presented; the important question is *what* must be presented. The answer: a "claim upon or against the Government of the United States, or any department or officer thereof." The subject of the pertinent sentence of the statute is "Every person"; the predicate is "makes or causes to be made, or presents or causes to be presented"; and the object of the sentence is a false "claim upon or against the Government of the United States, or any department or officer thereof." Nor is it material that the PWA approved the plans and specifications, contracts, changes and the like, exercised some watch over the construction of the improvements, audited the accounts relating to payment for the projects or did any of the other things which the relator has mentioned, because none of those acts resulted in giving the respondents "any claim upon or against the Government of the United States, or any department or officer thereof."

Assuming that there was no fraud whatever in the transaction, if one of the respondents who has not been paid in full, of whom there are several, sued the Government of the United States, or any department or officer thereof, for the balance of his contract price, would any court permit a recovery? Unless that question can be answered in the affirmative, notwithstanding that only the local municipalities ever contracted to pay the respondents, the respondents never had "any claim upon or against the Government of the United States, or any department or officer thereof" and the view of the Circuit Courts of Appeals for the Third and Fifth Circuits

in this case and *U. S. ex rel. Ostrager v. New Orleans Chapter, etc.,* 127 F. (2d) 649, is right.

What is meant by a claim against the United States was clearly defined by this Court in *Hobbs v. McLean,* 117 U. S. 567, 575, as follows:

> ". . . there was no claim against the United States to be transferred. Peck had at that time no contract even with the United States, and there was no certainty that he would have one. What is a claim against the United States is well understood. *It is a right to demand money from the United States.* Peck acquired no claim in any sense until after he had made and performed, wholly or in part, his contract with the United States." (Italics added)

The respondents never had any right to demand money from the United States or from any department or officer thereof, because they never had any contract with any of them. The respondents, therefore, never had, and consequently could not make or present, "any claim upon or against the Government of the United States, or any department or officer thereof".

The cases cited by petitioner are not in point. Indeed, it is a striking fact that *the petitioner does not cite any case anywhere in his brief in which a recovery was sustained under the informer act. Madden v U. S.,* 80 F. (2d) 672; *Langer v. U. S.,* 76 F. (2d) 817; and *U. S. v. Harding,* 81 F. (2d) 563, cited by petitioner, did not involve R. S. § 3490 or the incorporated § 5438. They were not informer actions, but purely criminal prosecutions based upon statutory provisions which *cannot* be invoked to maintain the present case. Thus, *Madden v. U. S., supra,* was a prosecution under § 28 of the Criminal Code (18 USCA § 72). The essence of the crime defined by § 28 of the Criminal Code is forgery. Section 28 of the Criminal Code, of course, is

not incorporated into R. S. § 3490. In *Langer v. U. S., supra,* the appellants were convicted under § 37 of the Criminal Code, but on appeal the judgment was reversed because the only employees assessed were those of the State and not of the Federal Government or any of the latter's agencies, and, therefore, there was no violation of any federal statute. What the petitioner quotes from this case is, therefore, dictum. More important than that, however, is the fact that this decision is based wholly on § 37 of the Criminal Code, which makes a crime of any conspiracy to obstruct the administration of any federal statute or governmental function, regardless of whether the Federal Government has sustained any pecuniary loss (see 76 F. (2d) p. 824). Section 37 of the Criminal Code is not incorporated into R. S. § 3490 and cannot support the present action. *U. S. v. Harding, supra,* also involved an indictment under § 37 of the Criminal Code (18 USCA § 88), the general conspiracy provision. The indictment was held to charge an offense because the defendants had allegedly conspired to hinder the United States "in its rights, operations, and functions" (see 81 F. (2d) p. 567). This decision is based wholly on § 37 of the Criminal Code which, as above stated, makes a crime of any conspiracy to obstruct the administration of any federal statute or governmental function, regardless of whether the Federal Government has sustained any pecuniary loss. Section 37 of the Criminal Code is not incorporated into R. S. § 3490, upon which the case at bar is expressly based, and cannot, therefore, support the case at bar. The cases principally relied upon by petitioner are distinguished by the court below in its opinion (R. 478, 127 F. (2d) 236).

U. S. v. Coggin, 3 Fed. 492, and *Dimmick v. U. S.,* 116 Fed. 825, from which petitioner also quotes, were both criminal cases in which the defendant personally had presented a fraudulent claim directly against the United States Government, for payment directly out of

the United States Treasury, and each claim was based on the Government's own alleged liability therefor. Those cases, accordingly, are essentially different from the case at bar where the respondents never had, and, therefore, could not make or present, any claim against the United States Government.

The relator now contends (p. 24) that there was a trust, in which "The chose in action of the municipality against the bank represented by the Construction Account became the trust res", and the municipality was trustee. Even if there were such a trust, which we deny, still the respondents had no "claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the" respondents—to use the language of this Court in the *Cohn* case, *supra*. *McKee v. Lamon,* 159 U. S., 317, and *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, 206 Fed. 663, cited by petitioner, simply hold that where money is specifically placed in the hands of one person to be delivered to another, the latter can force the former, the trustee, to turn the money over to him, but those cases do not hold, or even intimate, that the beneficiary could force the third party who created the trust to do so or that the beneficiary has any claim against said third party. In the case at bar said third party is the United States. On the contrary, in *McKee v. Lamon, supra,* this Court, in overruling the contention that the Choctaw Indian Nation—which there stood in the position of creator of the trust—was a necessary party to the suit, said (p. 321) that even if the Choctaw Nation was made a party defendant the complainants—who would correspond with the electrical contractors in the case at bar—would not "be entitled to any relief against the nation." In accord is *Roberts v. Calhoun County,* 45 F. Supp. 291, the other case cited by petitioner in this connection, because the contractor there, the plaintiff, was awarded only a general judgment against the

county, and the bank in which the construction account was kept was dismissed from the action over the plaintiff's contention that the money in said account should be subjected to the payment of the contractor's claim. Notwithstanding the trust theory, therefore, the respondents did not have a claim "against the Government, based upon the Government's own liability to" them and this essential element of a cause of action under the informer act would still be lacking.

The only claim of the respondents grew out of the promise contained in their contracts with the local municipalities that the local municipalities would pay them a certain sum of money for doing the electrical work on each project (R. 274). These claims were purely against the local municipalities *in personam*. No specific dollars or fund was prescribed by the respondents' contracts for their payment. Where the local municipalities obtained the funds to pay the contractors upon performance by the latter of their part of the contracts was immaterial as between the local municipalities and the contractors. The claims of the respondents were, therefore, simply *in personam* against the local municipalities, like any other contractual claim to collect a promised sum of money for certain services: *Kline v. Burke Construction Co.*, 260 U. S. 226, 228.

That there was no trust such as relator now contends is indicated by the terms of the offers from the PWA to the local municipalities. The gist of them is that the Government "offers to aid in financing the construction of" a specified improvement *"by making a grant to" the local municipality* (see Ex. 76, R. 179). The noun "grant" is defined in *Webster's New International Dictionary* (1939) as the "Act of granting" or as the "Thing or property granted; gift; boon". The verb "grant" is defined as follows:

"To bestow or confer, with or without compensation, particularly in answer to prayer or request; to give.

. . . . . .

"To give or bestow formally, usually in answer to a petition, as a privilege; to make conveyance of; to give the possession or title of, esp. by a deed or formal writing; to convey."

The language used by the Government, therefore, imports a gift rather than a trust. That such was also the understanding of the court and relator's counsel during the trial appears from the following (R. 46):

"*The Court*: . . . The grant of the Government was to the School District and not to anyone else."

. . . . . .

"*The Court*: . . . I do not see how any conclusion can be drawn from that, from what the witness has said in answer to the question propounded by Mr. Margiotti, that the money was paid to the electrical contractor by the Government, when as a matter of fact under all the evidence the grant was made to the School Board, who contracted with the contractors and raised that much money from the Government to apply on the contract. That is all I see in it.

Mr. Margiotti: That is correct."

Attention is also called to the decision of the Comptroller General of the United States rendered June 25, 1935, reported in 14 Comp. Gen. 916, the syllabus of which reads in part as follows:

"After the Federal funds loaned or granted to a State under authority of section 1 of the Emergency Relief Appropriation Act of 1935, dated April 8, 1935, are receipted for by the State they become State funds, and in the absence of a condition of the loan or grant specifically prescribed to the con-

trary, there would be no Federal law precluding a retired Marine Corps officer from holding an office or position created by a State, the salary of which is paid from the funds loaned or granted by the Federal Government."

That there was no trust is indicated also by the facts that the municipalities sometimes paid the contractors out of their own money before receiving the PWA grant and that all of the contractors had to be paid in full by the local municipality before the final installment of the PWA grant would be sent to the municipality (R. 53, 55, 112-113). In a trust the money is in the hands of the trustee before he makes any disbursement, whereas a gift to aid another in acquiring something may be made by way of reimbursement after the donee has expended his own funds therefor.

In arguing that there is a trust petitioner (p. 24) quotes part of a sentence from Form 230 requiring the grant payments to be deposited promptly in the construction account. That is bereft of significance, however, by the fact that the portion of the sentence which petitioner deletes from said quotation subjects to the same requirement of prompt deposit in the construction account the "Applicant's Funds" (R. 163). Petitioner also says (p. 25) "The required approval was in each instance given by the PWA Resident Engineer Inspector, as shown above." The same thought is repeatedly reiterated by petitioner in varying language. As pointed out in our Counter-Statement of the Case (p. 11), the Record shows that is not correct. The municipalities could and repeatedly did pay the contractors in full despite some exceptions to the PWA inspector's approval (R. 62, 101, 108-109, Ex. 245, R. 205, 207, 208, Tr. 64-65). Petitioner also says (p. 25) that "To the extent that monies received from the United States were not needed for that purpose [the project], there was

a duty to return them to the United States" unless there were outstanding bonds. There was, however, no general provision for the return of surplus money to the United States, the only provision to that effect being confined to the advance grant of 15% if the project were abandoned (R. 161).

Finally, in this connection, petitioner quotes (p. 25) a sentence from Form 230 (R. 163) providing that "Moneys in the Construction Account will be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government." It does not follow from that provision, we respectfully submit, that the contractor had "any claim upon or against the Government of the United States, or any department or officer thereof." The "certificate of purposes" is provided for in paragraph (j) of Part I, Section 1, of Form 230 (R. 158-159). It must be filed by the local municipality when it is applying for a loan or grant, together with its plans and specifications, and sets out in detail "the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project." A similar provision is uniformly found in construction mortgages made by banks or other lenders who agree to advance their funds to the owner as construction of the building or other improvement progresses, in order that the owner will have the funds necessary to pay the contractors and materialmen from time to time. Certainly in such a case, which is well known in the business world, the contractors who do the work have no claim against the bank or other lender, either *in personam* or *in rem*. The contractor's only claim in such a case is against the owner, who alone contracted to pay him, or *in rem* by a mechanic's lien against the building or other improvement. A mechanic's lien against the physical improvement is not, of course, a right *in*

rem against money loaned to the owner by a lender or given to the owner by, say, a relative. Furthermore, public buildings and improvements, such as are involved in the case at bar, are not subject to mechanics' liens in Pennsylvania: *Henry Taylor Lumber Co. v. Carnegie Institute*, 225 Pa. 486, 74 A. 357. In the case of ordinary construction mortgage loans, it is also common for the lender to maintain inspection over the work to see that it is being done in accordance with the plans and specifications, and also to exercise some supervision over the expenditure of the funds which it has loaned to the owner, to see that they are not diverted from the project to aid in financing which they were loaned. Those additional circumstances do not change the result that the contractor has no claim against the bank or other lender and no such claim has ever been asserted so far as we have been able to ascertain.

Concluding our consideration of the first clause of R. S. § 5438, it is respectfully submitted that the respondents never had, and, therefore, could not present, any false "claim upon or against the Government of the United States, or any department or officer thereof". An essential ingredient of a cause of action under the first clause is, therefore, missing.

4. *This case is not within the second clause.*

In the court below relator did not contend that he had a cause of action under the second clause of R. S. § 5438, but relied solely upon the language of the first clause. In this Court he contends for the first time that because of the periodical estimates of the respondents for partial and final payment to them from the municipalities and because of the non-collusion certificates which in most cases, but not all, accompanied the bids to the municipalities, he has a cause of action under the second clause of R. S. § 5438.

a. *The periodical estimates.*

The second clause of R. S. § 5438 (*ante*, pp. 22-23) requires the making or using of a "false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry". The periodical estimates for partial and final payment on the I-23 forms which were submitted, usually monthly, by the contractors to the local municipalities and which were used in conjunction with the payments by the local municipalities to the contractors did *not* "contain any fraudulent or fictitious statement or entry." These periodical estimates merely showed the proportion of the contractor's work performed during the preceding month, in order that he might receive that proportion of the lump-sum price specified in the written contract previously entered into between him and the local municipality. The last sentence can be confirmed by examining the periodical estimate which is printed in the Record (Ex. 245, R. 202-207). No "fraudulent or fictitious statement or entry," we submit, is contained in that periodical estimate.

The respondents made the electrical installations on the respective projects fully and satisfactorily in accordance with their contracts, and there is no contention to the contrary. The municipalities received the electrical installations to their complete satisfaction and they paid the respondents no more than the amount specified in their contracts with them. The aggregate of the periodical estimates simply equalled the price stipulated to be paid in the respective contracts. Where then is there any "fraudulent or fictitious statement or entry" in those periodical estimates?

The only portion of the periodical estimates on the I-23 forms to which petitioner points in attempting to

find a "fraudulent or fictitious statement or entry" therein is that part of the certificate of the contractor contained in the periodical estimate which reads as follows (R. 205): "that all work has been performed and materials supplied in full accordance with the terms and conditions of the corresponding construction contract documents between" the municipality and the contractor. The "corresponding construction contract documents", we submit, means the varied and detailed specifications and provisions describing and directing how the contract shall be performed, such, for example, as the kind, number and size of the wiring, outlets, fixtures and multitudinous other equipment to be installed. Those specifications and other provisions directing how the contract should be performed were so voluminous that they were eliminated from the printed Record, but an examination of any of the original contracts, all of which are included in the certified record on appeal, will show that those specifications and provisions composed the great bulk of the contracts. When the construction work is actually being done, those specifications and provisions are of paramount importance and in paying the contractor as the work progresses the essential inquiry is whether the work performed is in accordance with the corresponding construction requirements. The clause quoted by petitioner from the contractor's certificate on the periodical estimates is manifestly designed to meet that inquiry. There being no contention that any of the items of material or work listed in those periodical estimates as having been furnished during the preceding month is not correct, or that the materials and work were not in accordance with the corresponding construction contract provisions, it is submitted that there was no "fraudulent or fictitious statement or entry" in the clause quoted by petitioner from the contractor's certificate on the I-23 forms.

To say that the portion of the contractor's certificate on the periodical estimates for payment wherein the contractor certifies "that all work has been performed and materials supplied in full accordance with the terms and conditions of the corresponding construction contract documents" refers to the direction in the "Instructions to Bidders" that in case of individual bidders the full names of all persons interested with the signer should be set forth in the bid, or that it refers to or constitutes a reaffirmation of the non-collusion certificates in those cases where such certificates accompanied the bids, as petitioner argues (pp. 32, 34), is illogical and will not stand analysis. To say that the work and materials listed on a monthly estimate as having been furnished during the preceding month were "performed and supplied in full accordance with" all persons interested with an individual bidder having been set forth in his bid, or that the previous month's work and materials had been "performed and supplied in full accordance with" a prior certificate that there was no collusion in the bidding, does not make sense. The manifest purpose of the clause which petitioner quotes from the contractor's certificate on the periodical estimates for payment was to secure that assurance and commitment that the previous month's work and materials, for which payment was then being asked, were in accordance with the corresponding provisions wherever contained in the contract documents prescribing how and where the electric wires were to be strung, the many different kinds and sizes of electric cables and wiring to be used, the kind, number and locations of the outlets to be installed, the many different types and sizes of electrical fixtures to be supplied, the precise details of the complicated switchboards which were necessary, the number, kind and capacity of motors and generators to be furnished, the intricate fire alarm and telephone systems to be installed, the rates of wages to be paid differ-

ent classes of workmen, and infinite other specifications governing the performance of the construction work and the materials and equipment to be supplied by the contractor. It was to those specifications and provisions that the above quoted portion of the contractor's certificate on the periodical estimates for payment referred.

It should be noted that the provision quoted in petitioner's brief (p. 31) that "The proposal shall be signed by the bidder or bidders with his or their business address, and shall contain the full names of all persons interested with him or them" is taken from the "Instructions to Bidders" (R. 219-220) of Exhibit 566, and that it is not contained in the periodical estimates for payment. Furthermore, the sentence quoted by petitioner from the "Instructions to Bidders" was intended simply to elicit the names of the other partners of a firm when the one who signed the bid was a member of a firm, or the others who might be part owners of a business operating under a fictitious name, or the like, but, we submit, it did not call for a listing of all of the other electrical contractors in the community as petitioner now argues. That the sentence quoted by petitioner from the "Instructions to Bidders" was intended only to elicit the names of partners and co-owners of a particular business enterprise with individual signers of a bid is corroborated by the next sentence after the one quoted in the "Instructions to Bidders", which directs how a corporation shall execute the proposal form (R. 220); and is further corroborated by the corresponding direction in the "Instructions to Bidders" on the two Airport contracts (Ex. 618 and 619), as well as other projects, which is as follows: "All bids shall be made on separate blank form of proposal, and shall be signed by the bidder or bidders with his or their business address or addresses and, *except in the case of a corporation,* shall also contain the full names of all persons interested with him or them." (Italics add-

ed) This is also corroborated by the proposal forms which were furnished by the municipalities to be used by the contractors in submitting their bids. These forms had spaces after the place for the signature of the one executing the bid to show in what capacity he signed, the name of his firm, if any, and in the case of the Airport and other projects, spaces under such headings as "A partnership composed of the following persons:" (Ex. 628).

Only the contractor who was awarded the contract and did the work received anything on account of that job. The other contractors did not receive any share of the contract price. The other contractors did not share the profit or help bear the loss on any contract; that fell solely to the contractor who did the job. The other contractors were not, therefore, "interested with" the contractor who got a job in any such sense as those terms were employed in the sentence quoted by petitioner from the "Instructions to Bidders."

The periodical estimates for payment on the I-23 forms did not, therefore, "contain any fraudulent or fictitious statement or entry" and they consequently failed to make out a cause of action under the second clause of R. S. § 5438.

In the petitioner's brief (p. 20) it is said: "By the acts of each contractor here in presenting his periodical estimates for payment (Form No. I-23; R. 190, 202) he brought himself within all three of these requirements of the first clause of the statute, * * *." Some of the respondents never presented any periodical estimates or I-23 forms. Only the respondents who performed the jobs which are involved presented any such estimates. A number of the respondents did not have any of the jobs in question. Those who received the involved contracts can be determined from those contracts themselves, all of which are included in the

record on appeal, and they are also all listed on "Plaintiffs Tabulation of Damages" (R. 331) with the exception of the Daniels Electric Construction Co., which had one of the eight jobs on which a penalty was allowed but no damages.

b. *The non-collusion certificates.*

The only other documents relied upon by petitioner to make out a cause of action under the second clause of R. S. § 5438 are the certificates of non-collusion in bidding. In the first place, it is to be observed that there were no certificates, affidavits or any other form of statement of non-collusion in at least five of the projects involved. This is admitted in the petitioner's brief (p. 7).

Even in those instances in which certificates or affidavits of non-collusion in bidding accompanied the bids, they were *not* made, or used, for the purpose of aiding the municipalities to obtain from the United States Government what the latter had agreed to grant the municipalities. The second clause of R. S. § 5438 specifically requires that the document containing the fraudulent or fictitious statement or entry must have been made by the defendant "for the purpose of obtaining or aiding to obtain the payment or approval of such claim". "Such claim" petitioner admits (p. 29) requires a claim against the United States or any department or officer thereof. The element of a cause of action under the second clause of R. S. § 5438, which is required by the words quoted in this paragraph from it, is lacking so far as the non-collusion certificates and affidavits are concerned and they, therefore, cannot sustain this action.

No certificates or affidavits of non-collusion were required by the contract between the PWA and the local municipality (Ex. 22 and 76, R. 157-184) or by any regu-

lation or law. No requirement of such certificates or affidavits by the Federal Government or the PWA has been pointed out by petitioner. When they were required by the local municipality they were, in many instances at least, kept by the local municipality and not shown to the PWA (R. 49, 51-52). When a copy of them was included in the contract documents which were submitted to the PWA for approval, the PWA's approval did *not* apply to the certificate or affidavit of non-collusion, because the approval of the PWA was limited to the contract being in conformity with the agreement between the applicant (*i. e.*, municipality) and the United States (R. 217), which latter agreement did *not* require any certificate or affidavit of non-collusion in bidding but was largely devoted to requirements regarding the hiring and compensation of labor (Ex. 22 and 76, R. 157-184). The non-collusion certificates and affidavits accompanied the *bids* and were *not* "for the purpose of obtaining or aiding to obtain the payment or approval of [any] claim" upon or against the Government of the United States or any department or officer thereof, as expressly required by the second clause of R. S. § 5438. There is *no evidence* whatever that the certificates or affidavits of non-collusion in bidding influenced or motivated the PWA in paying its agreed grant to the local municipalities in the four installments as the work progressed as provided in the contract between the PWA and the local municipalities (Ex. 22, R. 160-163).

In those instances in which no certificates or affidavits of non-collusion in bidding existed, it is obvious that the PWA could *not* have been influenced or motivated by any such certificates or affidavits in paying to the local municipalities the funds which it had promised the local municipalities to assist them in constructing those projects. The significance of the fact that there

were no certificates or affidavits of non-collusion on at least five of the projects involved is not confined to those five projects, but is proof that no such certificates or affidavits were required by the United States or the PWA and that they were not a necessary document to move the federal or PWA authorities to pay the requisitions of the local municipalities for the PWA grants which had been promised them. Whether non-collusion certificates or affidavits accompanied the bids to the municipalities or not, the construction account was audited and the municipalities' requisitions honored just the same, and the petitioner's assertion (p. 13) that the non-collusion certificate was "a material part of the documents considered in passing on the question of payment by the United States under the grant in each case" is thereby refuted. Moreover, one-third of the PWA grant, known as the "Advance Grant", could be, and usually was, paid to the municipality before bids were even solicited from the contractors, and, therefore, before any certificates of non-collusion could exist on that project (Ex. 22, R. 160).

Also contrary to petitioner's statement, in the last paragraph of his footnote No. 7 (p. 13), it does not follow from the fact that the PWA suspended payment of part of its grants to the local municipalities, when its investigators discovered the illegal bidding by the electrical industry in Pittsburgh, that the certificates of non-collusion which sometimes accompanied the bids were "a material part of the documents considered in passing on the question of payment by the United States under the grant in each case." The suspension of payments by the Government resulted wholly from the Government's discovery that the bidding had been collusive, which would be true or not regardless of whether a certificate of non-collusive bidding had accompanied the bids on any given project or not. There is no evidence or intimation anywhere that the PWA's suspension of

payments to the local municipalities was in any way due to any certificates of non-collusive bidding and the PWA would doubtless have suspended grant payments exactly as it did upon discovery of the illegal bidding even if no non-collusion certificate or affidavit had ever existed. Indeed, the explanation by the PWA for its suspension of grant payments, referred to by petitioner in said footnote, supports the position of the respondents, because the Government thereby indicated its opinion to be that the right of action against the electrical contractors is in the local municipalities.

c. *No false claim against United States.*

Another element lacking, we submit, to make out a cause of action under the second clause of R. S. § 5438 is a claim against the United States that was "false, fictitious or fraudulent." Petitioner would supply that element under the second clause of R. S. § 5438 by the requisitions of the local municipalities upon the PWA for payment of the grants. The requisitions of the local municipalities against the PWA for payment of the four installments of the grant, we submit, were not "false, fictitious or fraudulent." They contained no "false, fictitious or fraudulent" statement. Each was in strict accord with the preexisting written contract between the municipality and the United States, which fixed the different stages in the progress of the project when the grant would be paid (R. 160-163). None called for any more than the amount which the United States had agreed in said preexisting contract to give the municipality to assist it in financing what it cost the municipality to construct the project. The municipalities were entirely innocent of any wrongdoing. The claims of the local municipalities against the United States Government clearly, therefore, could not be described as "false, fictitious or fraudulent."

A "false, fictitious or fraudulent" claim upon or against the Government of the United States, or a department or officer thereof, is, we submit, as necessary under the second clause of R. S. § 5438 as under its first clause. Certainly this is so when the statute is construed strictly as the cases hereinbefore cited (pp. 25-28) hold it should be. The claim is described in the second clause of R. S. § 5438 as "such" claim. That is just a short way of specifying the same kind of a claim as is spelled out in the first clause. The kind of a claim meant by the second clause is such as is defined in the first clause. The kind of a claim referred to in the first clause is expressly defined as a "false, fictitious or fraudulent" claim upon or against the Government of the United States, or any department or officer thereof. The first clause undoubtedly could not be satisfied by an honest, *bona fide* or innocent claim; neither, therefore, can the second clause. If Congress had intended to extend the second clause to an honest, *bona fide* or innocent claim against the Government, it could easily and plainly have said so. It is not for the courts, however, to extend a "drastically penal" statute by resolving doubts in meaning against the defendant. That is the exclusive province of the Congress. "Such claim" in the second clause, therefore, should be held to require a "false, fictitious or fraudulent" claim upon or against the Government of the United States, or any department or officer thereof, just as in the first clause.

U. S. v. Miskell, 15 Fed. 369 (C. C., Ky.), is directly in point. Holding that the defendant in that case was not guilty under the second clause of R. S. § 5438 because the claim in support of which his false affidavit had been used was not shown to be false, fictitious or fraudulent, the court said (p. 370):

> "The crime created and defined by the statute and formulated in the second count of the indictment is not the making or using of a false affidavit

to obtain payment of a *claim* upon or against the government, but it is the making or using a *false affidavit*, etc., for the purpose of obtaining the payment or approval of a *false, fictitious*, or *fraudulent* claim, etc. In other words, the crime charged in the second count of the indictment under consideration is composed of two elements — *First*, a false affidavit; and, *secondly*, the making or the using of such false affidavit to obtain the payment or allowance of a false, fictitious, or fraudulent claim."

In accord is *U. S. v. Jennison*, 26 Fed. Cas. 608, 609 (C. C., Kan., Miller, C. Justice).

In *Olson v. Mellon, supra*; it was said in the opinion of the District Court, which was adopted by the Circuit Court of Appeals and a certiorari denied by this Court (4 F. Supp. at 948):

> "It will be noted that section 5438, R. S., related only to *false claims against the United States*, . . ." (Italics added)

Edgington v. U. S., 164 U. S. 361, cited by petitioner, does not decide otherwise. It expressly appears that the pension claim in aid of which the defendant there allegedly made a false deposition was a *fraudulent* claim. Thus, in the statement of that case, which was by the Court, it is stated (p. 361) that defendant's false deposition was made "in aid of a fraudulent pension claim". And in its opinion this Court said (p. 363) "We think the offence charged in the present indictment, of making a false deposition in aid of a *fraudulent* pension claim, . . .". (Italics added) Consequently, the question whether the claim against the Government need not be fraudulent did not arise in that case and was not considered or decided.

Nor do the other three cases cited in petitioner's brief (p. 36) support his would-be construction of the sec-

ond clause of R. S. § 5438 so that it would not require a false, fictitious or fraudulent claim against the United States. Thus, in *U. S. v. Ingraham,* 49 Fed. 155, affirmed 155 U. S. 434, as clearly appears from the opinion of this Court at page 435, the defendant himself presented a false and fraudulent pension claim against the United States Government, and used an affidavit in support of his said claim which he knew contained false statements. The municipalities did not do any such thing in the case at bar. In *U. S. v. Jones,* 32 Fed. 482, the defendant himself presented a false pension claim against the Government. In charging the jury the trial judge treated the claim against the Government as fraudulent if the *person presenting* the claim against the Government knew that the affidavit of his relationship to the deceased soldier, which he used to support his claim, was false. In the case at bar, on the contrary, the municipalities, which alone presented claims against the United States, did *not know* that there was anything false in any papers presented by them to the Government, if indeed there was, which we deny. In *Bridgeman v. U. S.,* 140 Fed. 577, the last case cited by petitioner in this connection, the defendant, a Government Indian agent, himself presented a false, fictitious and fraudulent claim against the Government for reimbursement of money which he allegedly had paid to two Indians, but in fact had not. In that, as in the other cases cited by petitioner, there was, therefore, no occasion to decide, and it was not decided, that an offense may be committed which violates the second clause of R. S. § 5438 if no false, fictitious or fraudulent claim has been made against the United States.

U. S. v Coggin, 3 Fed. 492; *U. S. v. Strobach,* 48 Fed. 902; *Dimmick v. U. S.,* 116 Fed. 825; and *Evans v U. S.,* 11 F. (2d) 37, also cited by petitioner in his argument under the second clause, are all cases in which the defendant personally presented a claim which he knew was

fraudulent directly to and against the United States Government. Those cases, therefore, are not in point.

For the reason then that the periodical estimates on the I-23 forms for monthly payment did *not* "contain any fraudulent or fictitious statement or entry" and the non-collusion certificates which accompanied the bids were not made or used "for the purpose of obtaining or aiding to obtain the payment or approval of" the municipalities' requisitions of the grants, or for the entirely separate reason that the claims of the municipalities against the United States were not "false, fictitious or fraudulent", which is an essential feature of the claim required by the second clause of R. S. § 5438, it is respectfully submitted that no cause of action has been made out under that second clause.

5. *This case is not within the third clause.*

Finally, petitioner briefly argues that he has a cause of action under the third clause of R. S. § 5438. No such contention was made in the court below. No cases whatever are cited in support of petitioner's argument under the third clause.

R. S. § 5438, we submit, except for the clauses at the end relating to misappropriation of military equipment of the United States, applies only when there is a false claim against the Government of the United States, or any department or officer thereof. Each of the first three clauses of R. S. § 5438 requires, we submit, a false, fictitious or fraudulent claim against the Government of the United States, or any department or officer thereof. The first clause, which is set out at length, expressly requires a false, fictitious or fraudulent "claim upon or against the Government of the United States, or any department or officer thereof". The second clause does the same, by the words "such claim". The third and last

clause also clearly means a false claim upon or against the Government of the United States, or a department or officer thereof, for the offense is conspiracy to defraud "the Government of the United States, or any department or officer thereof" by obtaining the payment or allowance of a false claim (*ante*, p. 23). The purpose and intent of the third clause, it is submitted, was to make a crime of a combination or conspiracy by two or more to do what was made a crime by the preceding two clauses when done by a single individual, *viz.*, the making of a false claim, as the context shows, against the United States or any department or officer thereof. The language of R. S. § 5438, therefore, when read as a whole, precludes its application to a false or fraudulent claim upon or against a local municipality, like a county, city or borough of one of the states.

At least the above construction is one to which the third clause is rationally susceptible. Congress has not expressly said against whom the false and fraudulent claim in the third clause must be. Petitioner contends, without supporting authority, it may be against anyone. We contend, with the support of all the cases construing the section, that because the third clause is also expressly directed at claims "to defraud the Government of the United States, or any department or officer thereof", and in the light of the whole context of R. S. § 5438, the false and fraudulent claim referred to in the third clause also means a claim upon or against the Government of the United States, or any department or officer thereof. Applying to such a situation the rule of strict construction, which the cases hereinbefore cited (pp. 25-28) hold should be applied to this "drastically penal" statute, the construction confining the third clause of R. S. § 5438 to claims against the Government of the United States, or a department or officer thereof, is the one to be adopted. If Congress had intended to extend the third clause to

claims against anyone, it could easily and plainly have done so by simply adding after the word "claim" in that clause the words "against anyone" or "whether or not against the Government of the United States, or any department or officer thereof." But Congress did not in fact do so, and it is not for the courts to extend this "drastically penal" statute, but rather to regard it "with particular jealousy." The extension of the statute is a matter for consideration by the Congress.

Cases holding that the language of R. S. § 5438 requires as an essential element of liability that the false claim be against the Government of the United States, or a department or officer thereof, will now be reviewed. These cases all refer to the whole of R. S. § 5438 and, therefore, they apply as well to the third clause of that section as to any other. Two informer actions under the same statutory provisions as the case at bar have already been cited, in each of which a certiorari was denied: *U. S. ex rel. v. Mercur Corp., supra; Olson v. Mellon, supra.* Due to the length of this brief we will not repeat the directly pertinent language which has been hereinbefore quoted (pp. 30, 51) from them, but it should be noted that in both of them it was held that a false claim against the Government of the United States was required to make out a case under R. S. § 5438.

The Circuit Court of Appeals for the Fifth Circuit has construed R. S. § 5438 the same way. In *U. S. ex rel. Ostrager v. New Orleans Chapter,* etc., 127 F. (2d) 649, 651, that court said:

> "The statutes involved must be strictly construed, and they permit recovery by an informer only when it is shown that the defendants have presented a 'claim upon or against the Government of the United States, or any department or officer thereof,

knowing such claim to be false, fictitious, or fraudulent.'"

In *U. S. ex rel. v. McMurtry*, 5 F. Supp. 515 (D. C., Ky., 1933), an informer action was brought under R. S. § 3490 against employees of the Internal Revenue Department who were alleged to have conspired with a taxpayer, whereby the Government received much less in taxes than it should have. A demurrer to the complaint was sustained on the ground that no false claim against the United States was made. The court said (p. 516):

"Prior to the amendment of October 23, 1918, it was well settled that section 35 of the Criminal Code was directed solely against those offenders who made, or caused to be made, fraudulent claims against the government."

U. S. ex rel. v. Salant, 41 F. Supp. 196 (D. C., S. D. N. Y., 1938), was also an informer's action under R. S. § 3490. The complaint alleged that by joint resolution of Congress in February, 1933, cotton belonging to the United States was given to the American National Red Cross; that the latter was a corporation created by Act of Congress; that the President of the United States was the President of said corporation; that five of the directors of said corporation were representatives of the Departments of State, Treasury, Navy, War and Justice appointed by the President of the United States; that the accounts of said corporation were audited by the United States; that the corporation performed such services as were assigned to it from time to time by the United States Government and that it rendered periodical reports to Congress; that said congressional resolution further provided that the cotton given to the Red Cross by the Government should be manufactured into, exchanged for, or sold, and the proceeds used to purchase cotton clothing and bedding to be distributed among the

destitute; that such manufacture, exchange or sale of said cotton and the purchase of clothing and bedding should be without profit to anyone; that the defendant, which operated cotton textile mills, by fraudulent misrepresentations that the goods had not been made with convict labor, when in fact they had been, and other similar misrepresentations had succeeded in making a large profit on cotton clothing sold by it to the Red Cross; and "that all forms, papers and documents used in the execution of the purposes of said resolution of Congress identified the said cotton and articles into which it was converted as United States Government property." It was also alleged in the complaint that the American National Red Cross was the agent of the United States Government in these transactions and that the defendant had defrauded the Government of the United States by fraudulent claims out of the Government's cotton or the proceeds thereof. The defendant's motion for judgment on the pleadings was granted on the ground that the complaint did not state a cause of action. In the opinion in that case the Honorable Robert P. Patterson, now Undersecretary of War, said (pp. 196-197):

> "As section 5438 stood at the time of the enactment of section 3490 it forbade the presentation of false claims against the government or any department or officer thereof, and it also forbade any agreement, combination or conspiracy to defraud the government or any department or officer thereof by obtaintaining allowance of false claims. It further forbade certain acts relative to the military or naval services, but these provisions may be disregarded for present purposes. *It follows that this action may be maintained only if the false claims alleged to have been made by the defendant were claims against the government or a department or officer thereof.*

"The Red Cross is not a part of the government, nor is it a department or officer of the government. It is an incorporated association created by act of Congress for the purposes mentioned in the act. In no sense are its funds the property of the government. In acting under the Joint Resolution of February 8, 1933, the Red Cross did not become part of the government or a department or officer of the government. Under the terms of the Joint Resolution, it merely received a donation from the Government and administered it for the purpose specified. The facts set forth in the complaint and taken as true in considering a motion to dismiss for insufficiency, while sufficient to show that the defendant made fraudulent claims against the Red Cross and thereby obtained money, utterly failed to show that the defendant did any of the acts forbidden in Section 5438. Even if the informer were correct in urging that the Red Cross while acting under the Joint Resolution should be deemed an agency of the government, the presentation of false claims to such an agency and obtaining of money on them would not be the foundation of an informer's action under the Revised Statutes. A corporation which is an agency of the government is not the government or a department or officer of it." (Italics added)

The relator then amended his complaint, but the court held the amended complaint also to be insufficient in law and granted a motion to dismiss the action. In its opinion holding the amended complaint insufficient, which opinion and the amended complaint are printed in the Record (R. 419-432), the court said (R. 431):

"In a popular sense the cotton turned over to the Red Cross might be called government cotton, just as ships owned by the Emergency Fleet Corporation were called government ships. But in a legal

sense, and it is only in a legal sense that section 5438 of the Revised Statutes can be violated, the cotton was not owned by the government."

The court then went on to say that allegations in the amended complaint to the effect that the cotton remained the property of the United States, that it was earmarked as such, and that the money collected by the defendant was money belonging to the United States and the like were mere conclusions of the pleader, not supported by the facts and, therefore, should be ignored.

The analogy between the *Salant* case and the case at bar is patent. In each the Federal Government donated money or property to a corporation, to be used by the latter for the ultimate purpose of relieving the needy. In one case this was a corporation created and dominated by the Federal Government. In the other case the grants were to local municipal corporations created by the Commonwealth of Pennsylvania. In both the defendants' contracts were with said corporations to which the Federal Government had given its money or property. If the American National Red Cross, whose chief officer was the President of the United States, five of whose directors were executive officers of the United States, whose accounts were audited by the Federal Government, which reported to Congress and which did what was assigned to it by the Federal Government, was not a part of the United States Government, or a department or officer thereof, as that phrase is used in R. S. § 5438, then how can the County of Allegheny, the City of Pittsburgh or the School District of the Township of Kennedy be deemed to be a part of the Government of the United States, or any department or officer thereof? If the cotton donated to the Red Cross became the property of the latter, why did not the money paid by way of grant by the PWA to the local municipalities in the instant

case become part of the funds of the latter? Just as in that case the only claims which the defendant had were held to be against the Red Cross, so in this case the only claims which the respondents had were against the local municipalities. And even if, as said by Judge Patterson, the Red Cross or the local municipalities were deemed to be an agency of the Government, still that would not furnish the foundation of an informer's action under R. S. § 3490 and § 5438, because a corporation which is an agency of the Government is not the Government or a department or officer of it, a claim against which is required to make out a case under said sections.

U. S. ex rel. v. American Cotton Cooperative Ass'n. et al. (L. 58-272, U. S. D. C., S. D. N. Y., 1935) is an unreported informer case also brought under R. S. § 3490. The complaint in that case set forth 17 causes of action charging that millions of dollars which had been paid to the Cotton Stabilization Corporation and the Grain Stabilization Corporation by the Federal Farm Board out of the revolving fund provided by Congress in the Agricultural Marketing Act were fraudulently obtained by the defendants through various conspiracies, misrepresentations, concealments, falsifications of bills, invoices, warehouse receipts and book entries and the like. The action was dismissed because not authorized by the informer act. The opinion in that case was written by Judge Knox, now Senior District Judge of the Southern District of New York. It is very brief and relies principally upon *Olson v. Mellon*, supra. A copy of Judge Knox's opinion is in the Record (R. 432-433). This case confirms the view that R. S. § 5438 requires, as an essential ingredient of the offense therein defined, a false "claim upon or against the Government of the United States, or any department or officer thereof" and that a false claim against a corporation to which money has been appropriated by the

United States Government, and by which claim some of that money is fraudulently obtained by the defendant, will not make out a case within the purview of R. S. § 5438.

U. S. v. Bittinger, 24 Fed. Cas. No. 14,599 (D. C., Mo., 1875). This was a criminal prosecution under R. S. § 5438. The court defined the meaning of the word "claim" as used in that section as follows (p. 1150):

> "By making a claim, as defined in this statute, is meant the asking or demanding on part of the defendant of the government payment for services."

Capone v. United States, 51 F. (2d) 609 (C. C. A. 7, 1931), certiorari denied 284 U. S. 669. Defendant was convicted of income tax frauds and this was held to have been made a crime by the 1918 amendment to § 35 of the Criminal Code (18 USCA § 80). The Circuit Court of Appeals for the Seventh Circuit, however, expressly recognized that prior to said amendment that section, which then read like R. S. § 5438, applied only to false claims against the Government. The court said (p. 614):

> "It seems quite clear, and we accept it as established, that, prior to the amendment of 1918, section 80 applied solely to those offenders who filed fraudulent claims against the government."

In *Mookini v. U. S.,* 95 F. (2d) 960 (C. C. A. 9, 1938), appellants were convicted under § 35 of the Criminal Code as amended in 1918. The defendants had presented false claims for payment to the Director of the "Schofield Camp of the Civilian Conservation Corps, United States Department of Interior". The Circuit Court reversed on the ground that no false claim had been presented against the United States Government or any department or officer thereof. The court said (p. 961):

> "Appellants assign as error the overruling of their demurrers to the indictment. The assignment

is well taken. The indictment does not allege that appellants made or presented or caused to be presented any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States was a stockholder. It alleges that they made and presented a claim upon and against the Schofield Camp of the Civilian Conservation Corps; but it does not, nor could it truthfully, allege that said camp was the Government of the United States, or any department or officer thereof, or any corporation in which the United States was a stockholder. Hence, the indictment charges no violation of section 35, supra. It does not purport to charge any other offense. The demurrers should have been sustained."

While this was a criminal case, it construes the identical language of R. S. § 5438 upon which the case at bar is based. This case is, therefore, in point. Furthermore, it could be said of that case just as much as of the case at bar that money appropriated by the Federal Government was diverted to an illegitimate end.

Other cases which tend to support the position that R. S. § 5438 applies only to false claims against the Federal Government itself are *U. S. v. Long*, 14 F. Supp. 29, 30, 31 (D. C., Mass.); *U. S. v. Ambrose*, 2 Fed. 764 (C. C., Ohio); *U. S. v. Clark*, 121 Fed. 190, 191 (D. C. M. D., Pa.); *U. S. v. Byron*, 223 Fed. 798 (D. C., Ore.); *U. S. v. Christopherson*, 261 Fed. 225, 227 (D. C., Mo.); and *U. S. v. Crittenden*, 24 F. Supp. 84 (D. C., N. Y.).

There is no case, to our knowledge, holding that the third clause of R. S. § 5438 can be satisfied by a claim against one other than the Government of the United States, or a department or officer thereof. Indeed, the only case to our knowledge in which a recovery has ever been sustained under R. S. § 3490 and the incorporated

provisions of R. S. § 5438 is *U. S. v. Griswold,* 24 Fed. 361 (D. C., Ore., 1885). In the *Griswold* case the defendant had presented directly to the United States Treasury false and fictitious vouchers or invoices purporting to be claims for supplies furnished to the United States Government to prosecute the Oregon Indian War of 1854, and had thereby obtained money directly from the United States Treasury to which he was not entitled. The *Griswold* case, therefore, clearly involved a false "claim upon or against the Government of the United States", was plainly embraced within the language of R. S. § 5438 and did not decide any question that is in issue in the case at bar.

That § 35 of the Criminal Code even as amended in 1918 did not include excessive claims against local municipalities for payment for constructing projects financed in part by PWA loans or grants to said local municipalities is the only logical inference from the fact that in 1934 that section was amended by inserting after the clause "knowing the same to contain any fraudulent or fictitious statement or entry" these words: "in any matter within the jurisdiction of any department or agency of the United States." The added clause clearly embraces such claims as described above. There would have been no use or purpose in making the 1934 amendment if the statute as it existed immediately prior thereto had already included such claims. The 1934 amendment, of course, is not to be read into R. S. § 3490 or § 5438.

The same inference must also be drawn from § 9 of the Emergency Relief Appropriation Act of 1935 (c. 48, 49 Stat. 115, 118, 4 F. C. A., Title 15, § 728 Note, pp. 688-690), which specifically makes a crime out of what the respondents did in this case. This section, as well as the pertinent part of § 35 of the Criminal Code as amended in 1934, is printed at the top of the reverse

side of the I-23 forms (R. 204). It is noteworthy that the notice on the I-23 form which immediately precedes and introduces said two criminal statutory provisions reads as follows (R. 204):

> *"The project to which the contract herein referred to relates is a non-Federal project, the construction of which the United States of America, through the Federal Emergency Administration of Public Works, is aiding the owner in financing."*

A non-Federal project means that the Federal Government was not doing the work or contracting to have it done, that the project belonged to someone else, that the Federal Government did not have control of the work and that neither the Government of the United States, nor any department or officer thereof, was subject to any claim for payment by the contractors who did the work.

Footnote No. 6 in the petitioner's brief (p. 10) says that the I-23 forms "called special attention to the fact that claims against the United States were involved, by citing federal statutes punishing presentation of false claims against the United States (R. 190, 191; 202, 204)." That statement, we submit, is erroneous. The first statutory provision quoted on the I-23 form is § 9 of the Emergency Relief Appropriation Act of 1935, referred to above (R. 191, 204). This section clearly makes a crime of many acts not requiring claims against the United States. The other statutory provision quoted is § 35 of the Criminal Code of 1909, as last amended in 1934, *supra*. The 1934 amendment to § 35 of the Criminal Code extended it to any misrepresentation "in any matter within the jurisdiction of any department or agency of the United States", thereby making a claim against the United States unnecessary. It does not follow from those two statutory provisions, therefore, that claims against the United States are involved.

That the Government took the view which we are presenting is demonstrated by the fact that in explaining its retention of unpaid portions of grants it in effect stated that action against the electrical contractor because of collusive bidding should be taken by the local municipality. Thus, in explaining the withholding of $2,500 from the School District of the City of Pittsburgh on account of the promised grant for the Arsenal School, the PWA wrote as follows (R. 47):

> "The amount of $2500 withheld from this payment is a temporary suspension pending receipt of advice as to what action the owner decides to take against the electrical contractor in relation to bid irregularities."

The term "owner" in the above quotation refers to the local municipality (R. 49-51). Similar explanations will be found with reference to suspended portions of grants on other projects (R. 47-48, and see Ex. 150, R. 195).

Petitioner says (p. 39) "The third clause of R. S. sec. 5438 is directed at any form of joint action 'to defraud the Government of the United States' in any manner through false or fraudulent claims." The gravamen of the third clause was not any conspiracy to defraud the United States by any false claim against anyone, as contended by petitioner, for that was the substance of another section of the Revised Statutes, § 5440, now § 37 of the Criminal Code (18 USCA § 88)—the general conspiracy section under which the respondents were indicted, pleaded *nolo contendere* and were fined. Such useless duplication of statutory provisions, particularly when both provisions are contained in the same enactment, which was intended to codify the laws and eliminate duplications, is not to be attributed to Congress. Here again petitioner seeks to interpret the statute liberally, when as shown by the cases heretofore cited (pp. 25-28), the act is to be construed strictly and

"with particular jealousy" in a *qui tam* action. The third clause, we submit, is directed at a combination or conspiracy by two or more to do what was made a crime by the first two clauses when done by one alone, to-wit, the making of a false claim against the Government of the United States, or any department or officer thereof.

The quotation from the *Congressional Globe* on page 40 of petitioner's brief is set forth so that it conveys the impression, to us at least, that what is quoted was said in Congress in explanation of the third clause of R. S. § 5438. Such was not the fact at all. The clause quoted by petitioner did not, as would appear from petitioner's use of it, appear in any discussion of the conspiracy provision, nor even in any explanation of the bill. It appeared in a speech in opposition to the bill and in the particular part of the speech in which the quoted words were used objection was being voiced against the provision making persons not in military service subject to a *qui tam* action for penalty and damages. The sense in which the words quoted by petitioner, which we have italicized, were used appears from the following quotation, which includes not only the sentence in which the quoted words occurred but also the preceding and succeeding sentences (*33 Cong. Globe*, Part II, 37th Congress, p. 954):

> "Are there no courts; are there no district attorneys; is the form of indictment lost; or is it taken to be understood that a man can cheat the Government with impunity, although as to all other people he is amenable to the municipal laws for preventing frauds and cheats? I have no doubt that if the officers of the Government would do their duty when a man is caught procuring money by these pretenses, and *false and forged claims in any of the thousand modes by which it may be done*, he *could be punished*. He could be now if the proper officers

were on his trail, and if the proper precautions were taken to enforce the laws we now have."

Concluding our consideration of the third clause of R. S. § 5438, it is submitted that it, like the first two clauses, properly construed, requires a false claim against the Government of the United States, or a department or officer thereof. As the court below has convincingly shown in its opinion (127 F. (2d) at 237, R. 478-479), and as we have hereinbefore (pp. 30-33) tried to demonstrate, the respondents never had, and, therefore, could not make or present for payment or approval any claim upon or against the Government of the United States, or any department or officer thereof, and no false or fraudulent claim upon or against the Government of the United States, or any department or officer thereof, was made by the local municipalities. Accordingly, petitioner has not made out a cause of action under the third clause which he now belatedly briefly mentions.

6. *No falsity in respondents' "claims".*

Even if, let us assume for the sake of argument only, the case would otherwise come within the purview of R. S. § 3490, still we submit that no "false, fictitious, or fraudulent" claim was presented for payment or approval, because the claims were strictly in accordance with the existing written contracts on the respective jobs, to receive the amounts agreed in said contracts to be paid. There is no contention that the respondents did not furnish the electrical installations on the respective jobs in full accordance with their contracts. This is not a case in which defendants, having contracts with the United States Government under which the former were to furnish services or materials to the Government, presented claims for payment or approval, falsely representing that they had furnished the services or the ma-

terials, when in fact they had not done so. Such a case would come within the purview of R. S. § 3490 and the incorporated provisions of § 5438, and is a sphere in which those statutory provisions can find full effect. The illegality in the case at bar occurred in the bidding, resulting in the price agreed in the subsequent contract to be paid for the work being higher than it otherwise would have been, but there was no false or fraudulent misrepresentation in the periodical estimates for partial and final payment, nor was there any fraud or collusion in the presentment or approval of said periodical estimates (the I-23 forms). There was no falsification or fraud in anything which occurred after the contracts were executed. The municipalities received the electrical installations in accordance with their contracts, and they paid the contractors no more than the agreed contract price. The claims for payment were for proportions of the agreed contract price as the work progressed, and the whole of the claims just equalled, and did not exceed, the price stipulated in the contracts to be paid. We, therefore, submit as an alternative reason why this case does not come under R. S. § 3490 and the incorporated provisions of § 5438, that the claims presented by respondents for payment or approval were not "false, fictitious, or fraudulent", as required by the statute.

The first clause of R. S. § 5438 expressly requires that the defendant shall have made the claim "knowing such claim to be false, fictitious, or fraudulent." The second clause of said statute, as we have heretofore (pp. 50-51) tried to show, incorporates that description of the claim by referring to "such claim". The third clause of the statute is expressly confined to a "false or fraudulent claim."

What is meant by a "false" claim against the Government by R. S. § 5438 was held in *U. S. v. Shapleigh*,

supra (p. 128), to be "an untrue claim" as a claim for more services or materials than knowingly had been furnished. A "fictitious" claim was defined in the same case, and in *Bridgeman v. U. S.*, *supra*, as follows (p. 594):

> "A fictitious claim against the government is one preferred against it for supplies said to have been furnished to the government, or for services said to have been rendered to it, no part of which said supplies or services were in fact rendered or supplied."

A "fraudulent" claim under R. S. § 5438 was defined in both of the above cases, and others[3], as "a false or fictitious claim, gotten up or contrived by some person or persons with the design or purpose to deceive or defraud the government": 140 Fed. at 594.

The claims submitted by the respondents manifestly were not "false, fictitious or fraudulent." They were not "false" because they were at the agreed price for the exact quantity of labor and materials furnished. They were not "fictitious" because they were for valuable construction work actually performed by the respondents and accepted by the local municipalities. They were not "fraudulent" because they were neither false nor fictitious. Being for full performance rendered by the respondents and accepted and retained by the municipalities, the claims for payment in accordance with the pre-existing written contracts were not false, fictitious or fraudulent claims as required by the informer act.

Since the informer act applies only to false, fictitious or fraudulent *claims*, it does not apply to collusion in bidding or misrepresentation by which a contract is secured. This is especially true when the informer act is read literally and a would-be informer is required to bring a case strictly within the terms of the statute, as

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3. *E. g.*, *Mandel v. Cooper Corp.*, 42 F. Supp. 317, 319.

the cases hereinbefore cited (pp. 25-28) hold should be done.

Many of the cases above cited[4] hold that the statutory language in question permits recovery only for a "claim", meaning a demand for money. The "claim" which the informer act requires is not, therefore, supplied by a mere offer to contract or any collusion or misrepresentation attending such offer, because they neither singly nor collectively constitute a demand for money.

This position is fully supported by the recent decisions in *Mandel v. Cooper Corp.*, 42 F. Supp. 317, and *U. S. ex rel. Beckhardt v. Rockbestos Products Corp. et al.* (Civil 19-142), the latter being an unreported case decided by the District Court for the Southern District of New York on October 22, 1942. Both of those cases were also informer actions brought under the same statutory provisions as the case at bar. Both cases were dismissed for failure to state a cause of action under R. S. § 3490 and the incorporated provisions of R. S. § 5438. In the *Mandel* case the complaint alleged that the defendants, which included all of the large tire companies, had defrauded the United States Government by collusive bidding to supply the rubber tire requirements of the Government and that the Government, therefore, had entered into contracts to pay, and had paid, substantially higher prices for its tire requirements than it would have in open and fair competition. Holding that the suit was not authorized by the statute in question, Judge Coxe said (p. 319):

> "The present action sounds in tort. It really is an action for damages for alleged fraudulent

4. *U. S. ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors; U. S. ex rel. Olson v. Mellon; U. S. ex rel. v. Salant; U. S. ex rel. v. American Cotton Cooperative Ass'n.; Mandel v. Cooper Corp.; U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co.; U. S. ex rel. v. McMurtry; Mookini v. U. S.; Salas v. U. S.; Capone v. U. S.;* and *U. S. v. Bittinger*, all *supra*.

representations in the procurement of contracts to supply the tire requirements of the Government during the periods in question. It is not an action for damages sustained by the Government by reason of the presentation for payment or approval of fraudulent claims within the meaning of the informer statute."

The *Rockbestos* case was a similar action against all of the large cable companies, including the General Electric Company, charging them with collusion in submitting bids to the United States Government for insulated cable, for which the Government awarded contracts to various of the defendants, and in accordance with which contracts the defendants collected directly from the Government. No opinion was written in that case. Instead, we are advised that the court dismissed the action on the strength of its opinion in *Mandel v. Cooper Corp., supra,* with leave to amend the complaint.

Also supporting this position is the well-established principle that a sales contract is valid, and the buyer cannot defend an action brought by the seller to recover the agreed purchase price, notwithstanding that the seller was a member of an illegal conspiracy to fix prices and the contract price is alleged to have been higher than it otherwise would have been on account of such conspiracy. Among the decisions so holding are *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545, 549, 551; *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 172; *Geddes v. Anaconda Mining Co.*, 254 U. S. 590, 593; *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248, 252; *The Charles E. Wisewall*, 74 Fed. 802, 803; id. 86 Fed. 671, 674 (C. C. A. 2); *Hadley Dean Glass Co. v. Highland Glass Co.*, 143 Fed. 242, 244-245 (C. C. A. 8); *International Harvester Co. v. Oliver*, 192 Fed. 59, 66-67 (C. C., Ky.); *Bell v. Lamborn*, 2 F. (2d) 205, 207 (C. C. A. 4); *Milliken-Tomlinson Co. v. American Sugar Refining Co.*,

9 F. (2d) 809, 816, rehearing denied 10 F. (2d) 973 (C. C. A. 1); *Sinclair Refining Co. v. Wilson Gas & Oil Co.*, 52 F. (2d) 974, 975-976 (D. C., S. C.). In the *Corn Products Co.* case, *supra*, this Court, in a unanimous opinion, said (p. 172):

> "* * * the right to enforce the sale did not involve the question of combination, since conceding the illegal existence of the corporation making the sale, the obligation to pay the price was indubitable, and the duty to enforce it not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, applying them to the identical general question here involved."

The rule that a sales contract is valid and that the buyer cannot refuse payment on the ground that the contract price was increased because of a price fixing conspiracy participated in by the seller, applies whether the price fixing conspiracy is held illegal under common law principles or is expressly declared illegal and made a crime by a statute, such, for example, as the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, §§ 1-3 (15 U. S. C. A. §§ 1-3): *Connolly v. Union Sewer Pipe Co., supra*, 545, 549, 551. The test for determining whether a particular contract is valid and enforceable,

as held by this Court in the *Connolly* case (p. 549), is whether "the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination." In the case at bar, just as in each of the cases cited in the preceding paragraph, it is clear that the contracts between the local municipalities and the electrical contractors could have been proved simply by producing those written contracts and identifying the signatures of the municipal officers and of the electrical contractors thereto, without in any way disclosing or referring to the bidding system followed by the contractors.

The principle of *Connolly v. Union Sewer Pipe Co., supra,* and the cases in its train, is not dependent upon the buyer having had knowledge of the illegal conspiracy to raise prices in which the seller was engaged, but should nevertheless be particularly applicable to the many instances in the case at bar in which the respondents furnished their labor and materials in performance of their contracts, their work was accepted and payments were made to the contractors after the indictments had been returned and filed against the respondents and their illegal bidding practice was thereby made a matter of public notoriety, if indeed it was not largely so beforehand. For example, the printed Record shows that the indictment was returned and filed on November 3, 1939 (R. 295); that the periodical estimate on the I-23 form which is printed in the Record was approved by the municipality's architect on November 13, 1939 (R. 206); was approved, except for an unauthorized alteration, by the PWA inspector on November 22, 1939 (R. 207); and paid in full by the local municipality on November 24, 1939 (R. 208). That a municipality is bound by a contract which was procured from it by fraud, if it accepts benefits under the contract after it knows, or by the exercise of reasonable diligence should know, of the

fraudulent conduct, was held in *Kentucky-Tennessee L. & P. Co. v. City of Paris*, 48 F. (2d) 795, 800 (C. C. A. 6, cert. denied 284 U. S. 638), and in *People v. Stephens*, 71 N. Y. 527, 549-550, 557.

If the contracts between the local municipalities and the respondents were valid notwithstanding the antecedent collusive bidding, as held in *Connolly v. Union Sewer Pipe Co., supra*, and the cases following it, the claims for materials furnished and work done strictly in accordance with those contracts could not be false, fictitious or fraudulent.

The statute upon which this action is predicated requires a false, fictitious or fraudulent claim. No such claim was made or presented in this case. For this reason, in addition to and independent of the reason given by the Circuit Court of Appeals, its conclusion that this action is not authorized by the informer act is right.

There are other reasons beside the one upon which the Circuit Court of Appeals relied why its decision is right. The other reasons which will be referred to in this brief were all raised below, but it was unnecessary for the Circuit Court of Appeals to pass on the others after it had sustained one in favor of the respondents. A respondent in certiorari is entitled to affirmance of the judgment upon a ground other than that adopted by the court below: *Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U. S. 237, 239; *Ryerson v. U. S.*, 312 U. S. 405, 408. As this brief is the only one we will probably have the opportunity to file, we, therefore, proceed with the presentment of those other reasons herein.

II.

Defendants Are Being Punished Twice.

The respondents have already been punished by fines in criminal proceedings for the same acts upon which the case at bar is founded. Penalties and double damages are sought to be recovered, and are included in the verdict, in the present action. To subject the respondents to penalties, forfeitures or double damages for the same offenses for which they have already been criminally punished is unlawful.

The averments of the complaint (R. 5-32) in the case at bar are in most respects literally and in all respects substantially the same as the averments of the indictments at No. 10462 (R. 301-322) to No. 10498 (R. 323-329), both inclusive. The projects upon which damages are claimed in the instant suit are all included in the indictment at No. 10462 Criminal—indeed, they are listed in the same order in both. That the issues in the present case are the same as those at No. 10462 Criminal, we have from the lips of counsel for the relator. When he offered the record at No. 10462 in evidence, he said (R. 117-118):

> "We renew our offer to prove that at No. 10462 Criminal, United States of America v. Hess and Barton, et al, each and every one of the defendants in the instant case, including the corporations, were involved in said proceeding; that the said proceeding involved a conspiracy to cheat and defraud the Government by false and fraudulent bid rigging and the submission of false claims and certificates to the United States Government, and that the projects involved were the same projects involved in the present proceeding; that the issues were the same, except that in that proceeding it was criminal in nature and this proceeding is civil; . . . ."

That the issues are precisely the same in the case at bar as those at No. 10462 Criminal is particularly patent as to the respondents Bickford, Ridinger, Sr., Ridinger, Jr., and the Iron City Engineering Company, because none of those respondents made any certificates or affidavits of non-collusion and none of them was indicted for making any such false certificates or affidavits. They were defendants only in the general conspiracy indictment at No. 10462 Criminal. The only job left in the suit on which the Iron City Engineering Company even bid (but did not get) was the Airport, and as will be seen by referring to the Iron City Engineering Company's bid on that job (part of Ex. 628), there is no certificate, affidavit or other statement whatsoever contained in it referring to any such subject as collusion with others in bidding. That the Airport is one of the cases in which there was no certificate, affidavit or other statement of non-collusion can also be verified by examining the two contracts on that project (Ex. 618 and 619) and is *admitted* in the petition for certiorari (p. 7).

A case directly in point is *U. S. ex rel. Ostrager v. New Orleans Chapter*, etc., *supra*. The District Court based its dismissal of the complaint in that case on this ground, *i. e.*, that the informer's action under R. S. § 3490 was barred because it was an attempt to punish the defendants a second time, they already having been indicted and fined for the same acts, just as in the case at bar. The District Court's opinion in that case is not reported but is referred to in the opinion of the Circuit Court of Appeals for the Fifth Circuit (see 127 F. (2d) p. 650), and is contained, we assume, in the record in that case (No. 236 in this Court). The Court of Appeals did not decide this question but did say with reference to it (p. 651):

". . . there are authorities which lend strong weight to the view that such actions while civil in

form are criminal in their nature and effect, and that a former acquittal or conviction may be invoked to bar recovery in a proceeding under the informer statutes."

U. S. v. McKee, 26 Fed. Cas. 1116 (Case No. 15688) (C. C., Mo., 1877), is a leading case on the subject. It was decided by Circuit Justice Miller and Circuit Judge Dillon, the opinion being written by the former. That was a civil action based upon R. S. § 3296 (26 USCA § 2913) to recover the penalty of double the amount of taxes on liquor out of which the Government was defrauded by means of a conspiracy between the defendant and others to withdraw said liquor from bonded warehouses without payment of the taxes. The defendant pleaded that he had previously been indicted, convicted and sentenced for the same offense under R. S. § 5440 (18 USCA § 88), which makes conspiracy to defraud the Government a crime. The Government demurred to this plea. The opinion is in part as follows (p. 1117):

"In determining the sufficiency of both these defences, it is necessary to ascertain clearly the nature of the offence charged in the indictment for which the defendant has been punished; for if it is the same offence, as defined by law, for which he is now prosecuted, and is also for the same transactions, our laws forbid that he or any one else shall be twice punished for the same crime or misdemeanor.

"In the former trial he was indicted for a conspiracy to defraud the government of the United States out of taxes due on whiskey distilled by the several parties mentioned, and that in pursuit of that conspiracy other parties than defendant—who were his co-conspirators—did unlawfully remove said whiskey.

"It thus appears that the whiskey was actually removed; that by this removal the government was defrauded of its taxes; that defendant was one of the several persons who conspired together to do this act, though it was not charged that he personally took part in the acts of removal.

"In the present case, while he is not charged with a conspiracy by that name, he is charged with aiding and abetting this same removal, and, if convicted, will be punished for the same removals.

"We are all of opinion that his joining the conspiracy, of which the purpose was to remove the whiskey, was aiding and abetting the removal which was effected by means of that conspiracy.

"How can a man more effectually aid an unlawful act than by counseling and advising its execution, and giving his influence to its support, and the best energies of his mind to devise the safest and surest means of its accomplishment? If three men agree to compass the death of another, and one of them puts their joint purpose into effect, do not the other two aid and abet the murder? and is not such an agreement also a conspiracy to murder the victim?

"We are, therefore, of opinion that if the specific acts of removal on which this suit is brought are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action; and we are also of opinion that the allegations of the answer are sufficient averments that they are the same."

U. S. v. Gates, 25 Fed. Cas. 1263 (Case No. 15191) (D. C., N. Y., 1845), was a civil action under § 50 of the Act of March 2, 1799 (c. 22; 1 Stat. 627, 665), imposing a penalty of $400 for unloading goods without permit from any vessel in the United States between sunset and sunrise. The defendant pleaded that for the un-

loading of the same goods he had already been indicted, pleaded guilty and been sentenced for smuggling goods into the United States without payment of the custom duties thereon under § 19 of the Act of August 30, 1842 (c. 270; 5 Stat. 548, 565). The Government demurred. The demurrer was overruled and judgment entered for the defendant. The court said (p. 1266):

"Ordinarily mere statutory penalties are to be sued for and recovered by action of debt. 5 Dana, 243, 260; Jacobs v. U. S. (Case No. 7,157). But information will also lie, when no method is prescribed by the statute for recovery of the penalty. Adams v. Wood, 2 Cranch (6 U. S.) 336. And it would seem that the party may, at the election of the government, in place of a suit, be indicted and fined to the amount of the penalty (1 Chit. Cr. Law, 162), unless the special mode of remedy is pointed out by the statute (Bac. Abr. 'Indict,' E; Rex v. Sainsbury, 4 Durn. & E. (Term R.) 457; Hollingworth's Case, Cro. Jac. 577. If the defendant in the case had been before indicted on the 50th section and fined the amount of the penalty, and then this action for the penalty was instituted, it can scarcely be questioned that the plea sets up a complete bar to such proceeding; the averment of facts showing that the one case, in all its particulars, is involved in the other. It is laid down by Baron Gilbert that, if the party hath once been fined in an action on the statute, such fine is a good bar to an indictment, because by the fine the end of the statute is satisfied, Bac. Abr. 'Statute,' E. It appears thus to be clearly the law, when the proceedings are founded upon the same statutory penalty, that the government is restricted to a single exaction of the penalty, whether enforced by action or indictment. It is not perceived that any distinction in principle can be drawn between inflicting punishment for the same

offence, by different modes of prosecution under an enactment, or by applying to the case enactments in separate statutes, all having relation to precisely the same subject matter.

"The principle upon which the plea autrefois acquit, or autrefois convict, is founded, is that no man shall be placed in peril of legal penalties more than once upon the same accusation. . . . The government will be restricted to one satisfaction for an offence, whether the punishment be pecuniary or corporeal, unless the legislature, in explicit and in indubitable language, exact a further one."

The opinion ends as follows (p. 1267):

"The facts declared upon as the foundation for the penalty demanded by this action, then, being the same for which the defendant has already been indicted and punished, I hold that the action cannot be maintained, and that the plea is a good bar thereto, both because, the United States having obtained judgment and inflicted punishment upon the defendant for an offence, they are prohibited by general principles of law from prosecuting him again for acts constituting the same offence, or, in other words, which if proved, would call for his conviction of that offence, and because the punishment provided by the 19th section of the act of 1842 is not cumulative, and to be imposed in addition to that prescribed by the 50th section of the act of 1799, but is quoad hoc a substitution for, or repeal of, the latter."

Coffey v. U. S., 116 U. S. 436 (1886), was a proceeding *in rem* brought by the United States to forfeit liquor and distillery apparatus belonging to one Coffey, who allegedly had illicitly made the liquor and intended to defraud the Government of the tax thereon. Coffey filed a claim for the property and alleged that he had been

acquitted in a prior criminal prosecution for the same alleged acts, in which criminal prosecution all of the evidence necessary to maintain the allegations of the libel would have been admissible. This Court held that this plea was good and that judgment should be entered for the claimant, Coffey, dismissing the information or libel, and that the property should be returned to Coffey.

This Court cited with approval *U. S. v. McKee*, *supra*. The opinion is in part as follows (p. 443):

"Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

Boyd v. U. S., 116 U. S. 616 (1886), was a proceeding civil in form to forfeit some plate glass which allegedly had been imported without payment of the customs duty thereon. This Court reversed a judgment in favor of the United States because the claimants had been compelled to produce at the trial their invoice for the glass. Such production was held to be in violation of the Fifth Amendment to the Constitution which declares that no person "shall be compelled in any Criminal Case to be a witness against himself." Holding that the proceeding, though civil in form, was really criminal, this Court said (pp. 633-634):

> "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."

In the case at bar $112,000 of the verdict (R. 338) is specifically defined by the informer act (R. S. §§ 3490, 3492, 3493) as a "forfeiture", and this forfeiture is sought to be recovered by reason of offences committed by respondents. Within the exact language of this Court in the *Boyd* case, the present proceeding, therefore, though civil in form, is in its nature criminal.

U. S. v. One Distillery, 43 Fed. 846 (D. C., Cal., 1890), was a proceeding at law to forfeit a distillery and the liquor therein for failure to pay tax in violation of the Internal Revenue Law. One Young was the secretary and a stockholder in the corporation which owned and operated the distillery at the time when the tax was alleged to have been evaded. The property was now claimed by four men who had also been stockholders in said corporation but had purchased some of the property at an assignee's sale and had added other equipment thereto. The defendants pleaded *inter alia* that Young had previously been indicted, tried and convicted

criminally for failure to pay the tax. The Government demurred. The demurrer was overruled. *U. S. v. McKee, supra,* and *Coffey v. U. S., supra,* were cited as precedents. The opinion is in part as follows (p. 853):

> "The government had the right to proceed by civil action to enforce the forfeiture of the property because of the frauds, or to prosecute the parties engaged in it criminally; but for the same acts it could not do both, according to the ruling in the cases to which reference has been made. It does not seem to me to be material that Young does not here appear as a claimant. If the facts be as alleged, and upon the demurrer they are to be taken as true, the government indicted, convicted, and punished him for certain frauds committed in relation to the property in question; and for the same fraudulent acts and omissions that were introduced in proof in support of that indictment it asks the court in the present suit to decree a forfeiture of the property, the right to which accrued to the Government, as has been seen, at the time of the commission of the frauds, and when Young, as a stockholder in the corporation, was interested in every part and parcel of the property. To take the property in which he has an interest is to take his property; and, for the same acts and omissions, to punish him criminally and also take his property, is, for the same offenses, to punish him twice."

U. S. v. Shapleigh, supra (C. C. A. 8, 1893, Sanborn, J.), was a suit under R. S. § 3490 on account of allegedly fraudulent claims against the Government for materials to erect barracks. Judgment for the defendant was affirmed. In the course of an exhaustive opinion, the court said (p. 134):

> "Where provision is made by statute for the punishment of an offense by fine or imprisonment, and

> also for the recovery of a penalty for the same offense by a civil suit, a trial and judgment of conviction or acquittal in the criminal proceeding is a bar to the civil suit, and a trial and judgment for the plaintiff or defendant in the civil suit is a bar to the criminal proceeding."

U. S. v. LaFranca, 282 U. S. 568 (1931), was a civil action for taxes and penalties for selling liquor without a license. Prior to this suit the defendant had been convicted and fined in a criminal prosecution under the National Prohibition Act for the same sales of liquor. There were four items really involved; two of these were denominated as penalties charging double the amount of the tax which would have been assessed if the sales had been lawful, and the other two were also held to be penalties, though they were called taxes in the statute. It was held that none of these four items could be recovered, because they were barred by the defendant's prior punishment under the criminal law.

This Court cited with approval *U. S. v. McKee, supra*, and *U. S. v. Gates, supra*. The following are extracts from the opinion (p. 572):

> "By § 35, *supra*, it is provided that upon evidence of an illegal sale under the National Prohibition Act, a tax shall be assessed and collected in double the amount now provided by law. This, in reality, is but to say that a person who makes an illegal sale shall be liable to pay a 'tax' in double the amount of the tax imposed by preexisting law for making a legal sale, which existing law renders it impossible to make. A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexi-

cography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled by *Lipke v. Lederer,* 259 U. S. 557, 561-562."

(pp. 573-574):

"Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?

"In *United States v. Chouteau,* 102 U. S. 603, a distiller and his sureties were sued upon a bond, one of the breaches of which was that the distiller had removed spirits from his distillery without first paying the tax thereon. To this it was pleaded that before the suit was brought two indictments had been found against the distiller for the same removals, and that upon the recommendation of the Attorney General the government had accepted a specified sum in compromise and satisfaction of the indictments, which were thereupon dismissed and abandoned. The court held that the compromise was the same in principle as a conviction in the criminal proceedings, and that the action was barred; and at page 611 said:

" 'Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by

the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless.'"

U. S. v. Chouteau, 102 U. S. 603, from which the immediately preceding paragraph was quoted, was a civil suit on a bond to recover the penalty of double the tax on liquor which was removed without payment of the tax. Immediately after the foregoing quotation, this Court in the *Chouteau* case concluded its opinion as follows (pp. 611-612):

"Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have the same effect. The government through its appropriate officers has indicated, under the authority of an act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the goverment. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty. For, as it was justly said by this court in *Ex parte Lange,* speaking through Mr. Justice Miller, *'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.* And, though there have been nice

questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is proposed in the same court, on the same facts, for the same statutory offence. The principle finds expression in more than one form in the maxims of the common law.' 18 Wall. 163, 168." (Italics added)

In that case Mr. Justice Field for this Court also said (p. 610):

"That compromise necessarily covered the causes or grounds of the prosecutions, and consequently released the party from liability for the offences charged and any further punishment for them."

Returning to the *LaFranca* case, this Court in its opinion in that case also said (p. 575):

"The government contends that the word implies a criminal proceeding and can not be extended to include a civil action. But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action. In the *McKee* case, *supra*, Mr. Justice Miller evidently held that opinion, since he used both the words 'offense' and 'prosecution' in characterizing the civil action there under consideration. In any event, we should feel bound to resolve a greater doubt than we now entertain in favor of that interpretation of the word so as to avoid the grave constitutional question which otherwise would arise."

The last excerpt concerned the question whether the second suit came within the purview of the word

"prosecution" in § 5 of the Willis-Campbell Act (Act of Nov. 23, 1921, c. 134; 42 Stat. 222, 223; 27 USCA § 3), which provided that all laws regarding liquor which were in force when the National Prohibition Act was passed should continue in force, except that a conviction under either of those laws should "be a bar to prosecution" for the same act under the other.

U. S. v. Jun, 48 F. (2d) 593 (C. C. A. 10, 1931), was an action at law brought by the Government to recover $1,000 under § 35 of the Prohibition Act (Act of Oct. 28, 1919, c. 85, Tit. II, § 35; 41 Stat. 305, 317; 27 USCA § 52), for illegally manufacturing liquor, and for $17.60 under § 600 of the Revenue Act of 1919, as amended in 1926 (Act of Feb. 26, 1926, c. 27, § 900; 44 Stat. 9, 104), on account of the manufacture of 2¾ gallons of liquor. The defendant pleaded that he had been convicted for the same acts under the Prohibition Act. The District Court entered judgment for the defendant on all counts and the Circuit Court affirmed, saying (p. 594):

> "The fourth cause of action is based on title 2, section 35, of the National Prohibition Act (27 USCA § 52), which imposes 'a tax . . . in double the amount now provided by law, with an additional penalty of . . . $1,000 on manufacturers.' The sixth cause of action is based upon section 600(a) of the Internal Revenue Act of February 24, 1919, as amended by the Act of February 26, 1926 (26 USCA § 245). This section imposes a tax of $1.65 a gallon on liquors manufactured between January 1, 1927, and January 1, 1928, which is the period involved in this case; the same section provides that there shall be a tax of $6.40 a gallon imposed on such liquor if it is diverted to beverage purposes. The recovery sought on the sixth cause of action is for $6.40 a gallon.
>
> "It thus appears that the government seeks to recover a penalty under both the fourth and sixth

causes of action. The sum sought to be recovered under the fourth cause of action is a specific penalty. The sum sought to be recovered under the sixth cause of action is a penalty in part, $1.65 a gallon being tax, and the balance in fact being a penalty, although described as a tax."

U. S. v. Glidden Co., 78 F. (2d) 639 (C. C. A. 6, 1935), was a civil suit to recover over $2,000,000 as taxes and interest under subdivision 4 of § 900 of the Revenue Act of 1926 (Act of Feb. 26, 1926, c. 27; 44 Stat. 9, 104) for the diversion by the appellees of denatured alcohol to beverage purposes in violation of permits issued to them under the Prohibition Act. The defendants pleaded *inter alia* that they had already been indicted for the same acts, had pleaded *nolo contendere*, and had been sentenced to pay a fine which they had done. The Government's demurrer was overruled in both courts on the ground that the present suit was for penalties and, therefore, barred by the defendants' earlier punishment. After holding that what was sought to be collected was a penalty and not a tax, the court continued as follows (p. 642):

"The answer here alleges that the offense or offenses charged in the indictment consisted of a series of acts extending over and including the same period of time as charged in the petition in the case at bar, and that every fact alleged in the present petition might have been proved under that indictment. For present purposes these allegations must, of course, be taken as true. The United States, however, contends that the Maryland conviction is no bar because it was for the crime of conspiracy, whereas the tax here imposed, even if a penalty, is based upon the commission of substantive offenses condemned by the statute, and that a plea of nolo contendere may not be asserted by a defendant as a

bar to a subsequent civil action, for it is not a plea of guilty.

"While, of course, a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy, United States v. Rabinowich, 238 U. S. 78, 85, 35 S. Ct. 682, 59 L. Ed. 1211; United States v. Stevenson, 215 U. S. 200, 30 S. Ct. 37, 54 L. Ed. 157, yet it has been held that where there has been a conviction for conspiracy, and in a later case the defendant, while not charged with the conspiracy by name, is charged with aiding and abetting the commission of the very acts which were the objects of the conspiracy, the offenses are the same, and the former judgment is a bar to the second action. United States v. McKee, 26 Fed. Cas. page 1116, No. 15,688, approved United States v. LaFranca, supra. See, also, United States v. Chouteau, 102 U. S. 603, 26 L. Ed. 246; United States v. Gates, 25 Fed. Cas. page 1263, No. 15,191. The petition here meets the tests above indicated."

With specific reference to the plea of *nolo contendere*, it was said (pp. 642-643):

"Conviction and punishment on a plea of nolo contendere has been characterized as being '"in the nature of a compromise" between the prosecutor (state) and the defendant.' Tucker v. United States, 196 Fed. 260, 267, 41 L. R. A. (N. S.) 70 (C. C. A. 7). In United States v. LaFranca, supra, the court approved the doctrine of United States v. Chouteau, supra, that a compromise is the same in principle as a conviction in criminal proceedings. Quoting from its earlier decision, the court said, inter alia: 'The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the dis-

tiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless."

This Court denied a certiorari in the last case: 296 U.S. 652.

Judge Schoonmaker, the trial judge, held that there was no double jeopardy on the ground that the offense charged in the indictment at No. 10462 Criminal was not the same as that charged in the complaint in the instant case (R. 360). How can that be so, when it is the identically same collusive bidding of the respondents which constituted the basis of the criminal proceedings and the instant case? Counsel for the relator admitted that both proceedings involved the same acts and issues (R. 117-118). It is true that the indictment at No. 10462 Criminal did not refer to the various certificates or affidavits of non-collusion. The latter are referred to in the indictments against separate respondents at No. 10463 to No. 10498, inclusive. All of the indictments and records from No. 10462 to No. 10498, both inclusive, were offered in evidence by us (R. 126). Judge Schoonmaker, without giving any explanation, refers only to the indictment at No. 10462 (R. 358-360). Particularly under *U. S. v. Chouteau, supra,* we submit that *all* of the indictments from No. 10462 to No. 10498 are to be considered in determining whether double punishment is being inflicted for the same acts in this case, because we also offered to prove by the Special Assistant to the At-

torney General, who was in charge of all of the criminal proceedings, that an agreement was made between the Government and the defendants in those criminal proceedings that if the defendants would plead *nolo contendere* to the indictment at No. 10462 the punishment imposed by sentence at that number would be accepted as full satisfaction also of the defendants' liability under the other indictments, which latter would then be *nol. prossed*, all of the indictments being considered together and all the fines imposed at one number, rather than divided among the different numbers on the criminal docket, simply as a matter of convenience (R. 125). Such an agreement with the Department of Justice was recognized as valid in the *Chouteau* case, where no plea of any kind was entered nor any sentence imposed upon either of the two indictments involved in that case.

Even if the indictments at No. 10463 to No. 10498 Criminal could not be considered on the question of double punishment, because the records at those numbers show that those indictments were *nol. prossed*, which we do not concede, still that would not affect the question of double punishment so far as the respondents Ridinger, Sr., and Jr., Bickford and the Iron City Engineering Company are concerned. That is because those respondents never made any false certificates or affidavits of non-collusion and, therefore, all of their acts were embraced within the indictment at No. 10462 Criminal, in which specific proceeding the record shows that the defendants pleaded *nolo contendere*, and were each fined (R. 294-300).

The district judge also relies upon *Helvering v. Mitchell*, 303 U. S. 391, in rejecting our second contention (R. 360). That was an appeal from an assessment by the Board of Tax Appeals of a deficiency income tax with a 50% addition for fraud under § 293(b) of the Revenue Act of 1928 (Act of May 29, 1928, c. 852; 45

Stat. 791, 858). The defendant had previously been acquitted in a criminal prosecution under § 146(b) of the same Act for a willful attempt to evade the tax. The question was whether said former acquittal exonerated the defendant from the 50% addition. A majority of this Court held that the 50% addition was not a penalty but a civil sanction just as truly a part of the tax as interest on the tax would be. The decision was based in part upon the fact that the item in question was introduced in the Act under the heading "Additions to the Tax" and was specifically set forth in a supplement entitled "Interest and Additions to the Tax" (p. 405). The facts that the 50% addition to the tax was made assessable by an administrative agency, and collectible by distraint proceedings, were also relied upon as strong proof that Congress intended said 50% addition as a civil sanction (p. 402). If the sanction were punitive in character the defendant would be entitled to a jury trial and "the provision for collection by distraint would make it unconstitutional" (p. 402). This Court did not profess to overrule the doctrine that a civil suit for a punitive sanction is barred by a prior criminal proceeding. Demonstrative of this is the following excerpt from the opinion (p. 398):

> "Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction."

The *Mitchell* case is distinguished from the instant case by the following:

1. The amount in controversy in the *Mitchell* case was denominated as an "Addition to the Tax", not as a forfeiture, and was provided for in the same paragraph

of the statute which also provided for interest on the tax. In our case the $2,000 is specifically called a "forfeiture" by Congress (R. S. §§ 3490, 3492 and 3493), and is introduced by the clause "shall forfeit and pay" (R. S. § 3490).

2. The addition in question in the *Mitchell* case could be imposed by an administrative agency without a jury trial, whereas the amounts in controversy in our case cannot be imposed by an administrative agency, but only by a court and jury (R. S. § 3491). If the assessment may be imposed without a jury, it necessarily follows that the sanction is a civil and not a penal one.

3. The addition in question in the *Mitchell* case was collectible by distraint. If it had been a criminal sanction the provision for its collection by distraint would have made it unconstitutional. A statute is to be construed, if possible, so as to make it constitutional. The informer act, R. S. §§ 3490-3494, makes no provision for collection by distraint.

4. The addition in question in the *Mitchell* case was to a legal tax levied to raise revenue to operate the Government. The informer's act upon which the instant case is based is not a taxing statute or intended to raise money to operate the Government.

5. Taxes are levied upon legitimate business activity and are not confined to acts violative of the criminal law. Under the informer's act (R. S. § 3490) the $2,000 penalty and the double damages are recoverable only if the criminal law (R. S. § 5438) has been broken. The $2,000 penalty and the double damages may, therefore, be to help dissuade violations of the criminal law.

Upon analysis we submit that the *Mitchell* case supports our position.

The recent case of *Nye v. U. S.*, 313 U. S. 33, throws some light upon whether an exaction is civil or criminal in character. The question there was whether a contempt proceeding was civil or criminal in character. Holding that the proceeding was criminal, this Court by Mr. Justice Douglas laid down the criterion as follows (pp. 42-43):

> "As Mr. Justice Brandeis stated in *Union Tool Co. v. Wilson*, 259 U. S. 107, 110, 'Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review.'"

Applying the above test to the case at bar, it is clear that since at least a part of the recovery (the $2,000 forfeiture) is imposed as punishment and not as compensation to repair an injury, the criminal feature of the case predominates and fixes its character for legal purposes.

Petitioner argues (p. 19) that one of the informer act's "objectives obviously was to reimburse the Government for the heavy expense of investigation as well as for the loss directly resulting" from the defendant's acts. It is to be remembered, however, that this is a *qui tam* action and that under R. S. § 3493 (R. 408) one-half of any recovery in this suit will go to the private relator—and this notwithstanding that "the heavy expense of investigation", which brought into the open the plight of the electrical contracting industry in Pittsburgh, was borne exclusively by the Government before the relator was in any way identified with this matter.

The respondents having already been punished for the same acts which are the basis of the instant suit, it is earnestly submitted that they cannot under the law be subjected to additional and extremely oppressive punishment in the sum of the $2,000 forfeiture for each

project and the double damages which are included in the verdict. The respondents have already paid fines of $39,150 for the self-same offenses. $112,000 of the verdict is clearly a penal sanction, because it is expressly characterized as a "forfeiture" by Congress and is expressly termed in the verdict as a "penalty" (R. 338). The double damages are also, we respectfully submit, a penal sanction because of their very nature in going beyond compensatory damages or what is needed to make the injured party whole. That the double damages are penal in character is also indicated by the fact that the predicate which introduces them in R. S. § 3490 is "shall *forfeit* and pay". "Forfeit and pay" are the exact words used frequently in the criminal courts in sentencing a defendant. The penal character of the $2,000 forfeiture and the double damages is further manifested by the staggering amount which they aggregate in this case. Together they amount to over $200,000, which is approximately four times the aggregate of the fines imposed by the District Court for the same acts. Certainly requiring defendants to pay such enormous sums could only be intended as punishment and to prevent similar violations of the criminal law in the future. Having once already been criminally sentenced and having paid the fines imposed in the criminal proceedings, the respondents under elementary principles of Anglo-Saxon law, exemplified by the Bill of Rights to the Federal Constitution, cannot be subjected to additional punishment. This is not to say that the United States and the local municipalities cannot recover all actual damages suffered by them in appropriate proceedings.

III.

Official Consent Needed.

The necessary authorization or sanction by government officials for the institution and prosecution of this suit has not been obtained or shown. The relator has not shown that he obtained the authorization or sanction of the Commissioner of Internal Revenue, of the Attorney General or of any other government official, and in fact he has not obtained any such approval. We submit that the authorization or sanction of the Commissioner of Internal Revenue and of the Attorney General is a condition precedent to the bringing and maintaining of such a suit as this.

R. S. § 3214 reads as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings: *Provided,* That in case of any suit for penalties or forfeitures brought upon information received from any person other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

The decision in *Olson v. Mellon, supra,* relied upon R. S. § 3214 as an alternative ground. Apropos this is the following in the opinion in that case (4 F. Supp. at 950).

> "We know of no rule in relation to the construction of statutes which takes the instant cases out of the purview of section 3214, Rev. St. As we interpret it, it discloses a plain intent on the part of Congress to keep all cases for the collection of internal revenue taxes, fines, penalties, and for-

feitures under the supervision of the Commissioner of Internal Revenue."

R. S. § 3214 should not be limited, we submit, to suits involving taxes. The section was expressly extended by Congress to cover as well any suit for the recovery "of any fine, penalty or forfeiture." A forfeiture is sought to be recovered in the instant suit. $112,000 of the verdict is expressly returned therein as a "penalty" (R. 338). As we have already seen, the $2,000 item is specifically described as a forfeiture by Congress in the informer's act upon which this suit is brought (R. S. §§ 3490, 3492 and 3493). R. S. § 3214, therefore, by its express terms applies to the case at bar.

That R. S. § 3214 embraces *qui tam* actions is corroborated by the fact that such actions are expressly included in the immediately preceding section of the Revised Statutes (§ 3213), which is printed in the Record (R. 418-419). R. S. § 3213 provides in part that "All suits for fines, penalties, and forfeitures, * * * shall be brought in the name of the United States, in any proper form of action or by any appropriate form of proceeding, *qui tam* or otherwise, * * *." Both R. S. §§ 3213 and 3214 were derived from § 41 of the Act of July 13, 1866, c. 184 (14 Stat. 111).

Also indicative that R. S. § 3214 applies to *qui tam* actions is the proviso regarding costs at the end of that section. The proviso begins "That in case of any suit for penalties or forfeitures brought upon information received from any person other than a collector or deputy collector, * * *" which evidently refers to *qui tam* actions.

That § 3214 and § 3490 appear under different titles in the Revised Statutes is not to be considered in con-

struing those sections because R. S. § 5600 provides as follows:

> "Sec. 5600. The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed."

That the Department of Justice should have control over all suits, such as the one at bar, to prosecute a claim due to the United States, or an offense against the Government, appears, it is submitted, to have been the intent of Executive Order No. 6166, issued by President Roosevelt on June 10, 1933, under the authority of the Reorganization Act of March 3, 1933, c. 212, § 16, 47 Stat. 1517. That executive order reads, so far as material here, as follows:

> "Section 5.—Claims by or against the United States
>
> The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government and of supervising the work of United States attorneys, * * * in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.
>
> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice."

The effect of the foregoing executive order, it is submitted, is to place all prosecutions of claims and demands by, and offenses against, the Government, under the control of the Department of Justice. Such control necessarily includes the determination "whether and in what manner to prosecute." The relator in bringing such a suit as this purports to be acting for the United States. May he not, therefore, be embraced by the terms "any agency" in the above Executive Order? This construction does not require any holding that the informer act has been repealed, but merely that approval of the Department of Justice is now necessary for all prosecutions of claims by, or offenses against, the United States. That is a reasonable and salutary requirement and as applicable to an action brought under an informer statute as any other. The rule of construction applicable to such a situation, we submit, is that applied in *U. S. v. Hutcheson,* 312 U. S. 219, 235.

Following Executive Order No. 6166, issued by the President, the Act of February 10, 1939, c. 2, 53 Stat. 1, 460 (26 USCA § 3740), provides as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced."

The approval of the Attorney General is now, therefore, also required for such a suit as this. Since his approval has not been shown, the suit cannot be maintained.

There are sound reasons of public policy underlying the requirements that the Commissioner of Internal Revenue and the Attorney General must approve such a suit as this. It is not necessary, however, to delve into them because Congress has clearly ordained that no suit affecting the revenue of the United States shall be

brought without the sanction of those governmental officials. There is no reason apparent to us why such requirement should not apply to suits to recover alleged excessive charges against the Government and penalties incident thereto, as well as to suits to recover taxes wrongfully withheld. In either case, the suit is to recover money owing to the Government.

The requirement for the approval of the Commissioner of Internal Revenue and of the Attorney General is particularly applicable to the case at bar. R. S. § 3492 (R. 407-408) provides that "It shall be the duty of the several district attorneys of the United States for the respective districts . . . to be diligent in inquiring into any violation of the provisions of section 3490 by persons liable to such suit, and found within their respective districts . . ., and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages." The District Attorney, with the assistance of the Department of Justice, conducted the prior criminal proceedings. After the District Attorney had thus uncovered the whole situation and the respondents had already pleaded *nolo contendere*, relator, eleven days before the date for sentencing, brought this suit (R. 2, 295-296). There is no showing that the District Attorney would not have performed his lawful duty under R. S. § 3492 or that he would not have brought suit or taken other proper measures to recover the Government's actual loss. That the verdict in this case is large will not justify an interloper without Government sanction to step in quickly and usurp the office of the United States Attorney.

If the action for recovery of the Government's damages can be taken out of its hands as in this case, the same can be done in every case. And this notwithstanding that the so-called informer who succeeds in the race to bring such a suit as this first did absolutely nothing

to aid the Government in uncovering the illegal practices and had no more right to bring such a suit than any other member of the public. Cf. *The City of Mexico*, 32 Fed. 105, 106. The ever present danger of some litigious person bringing such a suit as this will have the effect, we predict, of preventing defendants in criminal proceedings brought by the Government from pleading *nolo contendere* and will thereby handicap the Government's efforts successfully and expeditiously to terminate its investigations and to break up illegal business practices. Moreover, the danger of such suits as this, several of which, including the tire, cable and military optical instrument cases heretofore mentioned (pp. 27, 70), have been instituted since the verdict in the case at bar was returned, has become, it was stated by the Honorable Assistant Attorney General Arnold in his oral argument for the Government before the court below, an obstruction to the war production program. The construction of the statutory provisions in question for which we are contending would, therefore, be more conducive to the public welfare.

IV.

No Damages Proved.

There is not sufficient evidence, we submit, by which to assess or measure any damages. It is impossible to tell from the evidence how much the Federal Government paid out because of the offenses of the respondents which it would not have paid out in the absence of such acts of the respondents. The burden is on the plaintiff to prove the damages and to introduce the facts and data upon which the actual damages, if any, could be determined with reasonable accuracy: *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156, 165; *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98.

The relator called a witness who was held by the court to be qualified as an estimator of electrical costs and had him testify what in his opinion would have been a fair and reasonable low bid in open competition for the electrical work on each project. The relator then deducts said estimate from the contract price at which each electric job was let, and then takes 30% or 45% (as the case may be) of the difference between the actual contract price and the relator's testimony of what a fair bid in open competition would have been and calls that the actual damages suffered by the United States Government (see "Plaintiffs Tabulation of Damages" (R. 331), which is a compilation prepared by the relator and sent out with the jury). The relator and the court below considered that sufficient evidence to prove the damages sustained by the Federal Government. We submit that this is fallacious in that it entirely ignores the specific limitation in each PWA offer of the maximum grant to a fixed sum in dollars and cents. The relator's theory would be correct if the PWA offer was simply of 30% or 45% of the actual cost of each project, or if the total actual cost was less than the originally

estimated cost on which the maximum limitation of the amount the PWA would contribute was calculated. In every case, however, after agreeing to grant the local municipality 30% or 45% of the cost of the project upon completion, there is the specific limitation "but not to exceed, in any event, the sum of $....." (R. 116-117, Tr. 64, and see Ex. 76, R. 179, and Ex. 68, 69, 70, and 72, included in the record on appeal). This limitation was enforced in practice and cannot be ignored in law.

Because of the specific limitation in dollars and cents on every PWA grant, if the cost of any project would have exceeded the total originally estimated cost, even had the electrical contract been let at the relator's estimate of a fair and reasonable low bid in open competition, still the Federal Government would have contributed just as much to that project as it actually did. Perhaps an illustration using round figures will make the proposition clearer. Assuming that the originally estimated cost of a project was $100,000, the PWA would agree to grant 45% of the cost of constructing that project "but not to exceed, in any event, the sum of" $45,000. When the project is actually constructed, however, let us assume its total cost amounts to $115,000. Notwithstanding the project costs $15,000 more than originally estimated, the PWA pays the local municipality only $45,000, the maximum placed upon its offer. Now let us further assume that the electrical part of the project was let for $20,000, but the relator's evidence is that in open competition a fair and reasonable low bid for the electrical work would have been $12,000, or $8,000 less than was actually paid for the electrical work. Deducting the said $8,000 from the total cost of $115,000 still leaves $107,000 as the amount which the project would have cost in the absence of any collusive bidding for the electrical work. Since $107,000 still ex-

ceeds the originally estimated cost of $100,000, the PWA would have contributed the same amount, *i. e.*, $45,000, as it actually did when the electrical contract was $8,000 more than it should have been. In this case then, whether there was collusive bidding or not among the electrical contractors, the PWA would have contributed exactly the same amount to the construction of the project and, therefore, the Federal Government did not suffer any damage in that instance by reason of the electrical contract having been increased $8,000 by collusive bidding.

The proposition under consideration may be demonstrated not only by hypothetical examples but also by a few projects involved in this case as to which there is sufficient evidence in the record. As set forth in the statement of the case[5] Snowden Township School District actually received only $23,727 from the PWA (R. 102), which was 45% of the originally estimated cost of the school of $52,727, and the maximum amount of the PWA offer (Tr. 294). The actual cost of the school, however, was $62,633.15 (Tr. 297), 45% of which actual cost is $28,184.92. The electrical contract on that school was actually let for $4,200, but would have been let according to the relator if there had been no collusion for $3,539.68 or $660.32 less than the figure at which the electrical contract was actually awarded [see "Plaintiffs Tabulation of Damages" (R. 331)]. Subtracting the alleged excess in the electrical contract of $660.32 from $62,633.15, the total cost of the school, leaves $61,972.83 as the amount which the school would have cost in the absence of collusion among the electrical contractors. But even if the school had only cost $61,972.83, the PWA would still have paid to the School District the sum of $23,727, the amount which it actually did pay, because even without the alleged excess

5. *Supra*, p. 6.

in the electrical contract the school would still have cost more than the originally estimated cost of $52,727. In this case it is, therefore, certain that the United States Government did not lose a cent by reason of the respondents' acts.

The Miller School erected by the School District of the City of Pittsburgh is another example. As will be seen from Exhibit 72, which is included in the record on appeal, the grant there was of 45% of the cost of the school "but not to exceed, in any event, the sum of $101,541." By reference then to Exhibit 26, also in the record on appeal, it will be seen that the amount actually paid by the PWA to the Pittsburgh School District was $101,541, though the Miller School actually cost to construct a total of $289,879.69, as against an originally estimated cost of $225,647 (the last figure may be obtained either by determining the amount of which 45% is $101,541 or by adding the PWA grant of $101,541 to the estimated cost to the School Board of $124,106). Now referring to "Plaintiffs Tabulation of Damages", on which the Miller School is the first project, it will be seen that the electrical contract was for $24,152, whereas if there had been open competition according to relator it would have been $14,023.10, or $10,128.90 less (R. 331). Finally, subtracting the alleged excess in the electrical contract of $10,128.90 from $289,879.69, the actual total cost of this school, leaves $279,750.79, which is still much above the originally estimated cost of $225,647. In the case of the Miller School it is also certain, therefore, that the United States Government would have contributed no less even though the electrical contract had been awarded at the figure which the relator says would have been fair.

The same applies to the Crescent School. The PWA offer to aid in financing that school was 45% of the cost upon completion "but not to exceed, in any event, the

sum of $244,737" (Ex. 70). The latter figure was also the exact amount received by the Pittsburgh School Board from the PWA on account of this school (Ex. 26). The actual total cost of constructing this school was $600,281.20 (Ex. 26). The electrical contract on this school was for $34,940, whereas it should have been according to the relator $20,342.73, or excessive to the extent of $14,597.27. Subtracting the alleged excess of $14,597.27 from the actual cost of $600,281.20 leaves $585,683.93, which the school would have cost according to the relator if there had been no collusive bidding for the electrical contract. 45% of the latter figure is $263,557.77, or still some $18,000 more than the PWA actually paid the School District for the Crescent School. In other words, in this case also the PWA would have contributed exactly the same amount which it did had the electrical contract been let under perfect conditions. The Federal Government, therefore, could not have lost a cent on the Crescent School by reason of the respondents' collusive bidding.

The same formula applies to every one of the 48 projects on which damages were allowed by the trial judge. It not only applies in instances like the above where the actual total cost of constructing a project exceeds the originally estimated cost by more than the alleged excessiveness in the electrical contract, but also to cases where but for the alleged excessiveness in the electrical contract the project would have been completed at less than the originally estimated cost. In the latter instance, the Federal Government could not suffer damages to the extent of 30% or 45% of the alleged excessiveness in the electrical contract, as claimed by the relator, but only at most 30% or 45% of the amount by which the alleged excessiveness in the electrical contract exceeded the amount by which the actual total cost of the project overran the originally estimated cost

of that project. In other words, the Federal Government could suffer damages of 30 or 45% of that portion only of the alleged excessiveness of the electrical contract which brought the cost of the whole project to the fixed limit of the Government's grant, *i. e.*, to the amount beyond which the Government would contribute no more.

In the above instances and a few others the necessary facts to determine whether the PWA paid more to the local municipality than it would have if the electrical contracts on those respective jobs had been let at the figures at which they would have been according to the relator in the absence of collusive bidding, are in the record, but as to the other projects, which include most of the 48 on which damages were allowed by the trial judge, there is no evidence of the total amount which each project actually cost when completed and it is, therefore, impossible to tell whether the Federal Government actually paid out more money with reference to them than it would have in the absence of collusive bidding. The burden of proving the damages incumbent upon the plaintiff cannot be met merely by evidence that the electrical contract was excessive by a given amount.

The trial judge rejected this contention saying (R. 370): "We cannot follow this argument. Whatever the cost of the entire project may have been, the Government would be damaged so far as the electrical contracts are concerned, to the extent that it contributed to them in excess of what it would have been required to contribute, had there been open and fair competition." With all due deference to Judge Schoonmaker, we submit that his answer is merely begging the question. We are not disputing that the Government would be damaged to the extent that it contributed to the electrical contracts in excess of what it would have been required to contribute if there had been open and fair competi-

tion. Our point is that there is not sufficient evidence to prove to what extent, if any, the Government contributed to the electrical contracts in excess of what it would have been required to contribute if there had been open and fair competition. This contention Judge Schoonmaker does not answer.

On this question of the sufficiency of the proof of the damages, Judge Schoonmaker also dwells at length upon the rule for measuring the damages which he adopted, viz., "The damage to be recovered, therefore, would be the money which the Government contributed to each project in excess of what it would have paid, had there been fair and open competition" (R. 369). We have raised no question about that being the proper measure of damages. The rule for measuring the damages is one thing, but whether there is sufficient evidence to prove the legally recoverable damages is quite another thing. Our position is that there is not sufficient evidence by which to tell how much, if anything, "the Government contributed to each project in excess of what it would have paid, had there been fair and open competition." That cannot be told without showing the actual total cost of each project when completed and that the alleged excessiveness of the electrical contract exceeds the amount by which the total cost of the project overruns the originally estimated cost of the project, and if so by how much, or that the actual total cost of the project when completed was less than the originally estimated cost. If no damages have been proved, the judgment of the Circuit Court of Appeals should be affirmed. It may, however, be mentioned that the proposition considered in this subdivision of our brief was presented to the trial judge in our request for charge to the jury No. 7 (R. 335). That point was refused by the trial judge and that action of his constitutes the 11th reason in our motion for a new trial (R. 342).

V.

Evidence of Actual Cost Admissible.

If this Court agrees with any one of the preceding four points, it will not be necessary to consider any of the remaining questions. If all of the preceding arguments were rejected, however, we submit the respondents would be entitled to a new trial for any one of the reasons briefly presented herein under Points V, VI and VII. What follows in this brief is included not because of any lack of confidence by us that the judgment of the Circuit Court of Appeals should be affirmed, but simply because all of our arguments must be presented in one brief.

The principal evidence which the respondents intended to introduce on the question of damages consisted of the actual cost of doing the electrical work on the projects in question. The respondents offered to prove such actual costs and that such costs were fair and reasonable and the lowest prices at which the work could be done in accordance with the respective contracts. All of this evidence was excluded (R. 120-123). We submit that was substantial error.

The actual cost of doing a job is the best evidence of what a reasonable price for that work would have been. That is because it was only natural for the respondent who was awarded the contract at a fixed price on each project to buy the materials and equipment at the lowest possible prices and to use as little labor as possible. What better guarantee could there be that the actual costs represented the fair and reasonable price for each job than the incentive of the contractors to make as much profit for themselves as possible, which they would do by keeping the actual cost of completing each project as low as they could? While there may be

some variation in prices of labor and material between the time of bidding and the doing of the work, the variation in the space of time which elapsed in this case would not be sufficient, we submit, to justify rejecting evidence of costs, particularly when we offered to follow the evidence of actual costs with other evidence that the actual costs were fair and reasonable and the lowest prices at which the work could be done. Stock articles and labor were relatively stable in price during the period from 1935 to 1939, inclusive, and it is common experience that the price of standard material like wire, conduit and outlet boxes, as well as labor, does not fluctuate drastically or suddenly. As for the special equipment, the contractors had to obtain quotations for it from manufacturers or distributors before making up their bids, so that there could be no variation as to such equipment between the time of bidding and doing the work. Such variations as there may be in prices of electrical equipment and labor over a period of months result in much less uncertainty or basis for rejecting the actual costs as a criterion of what would have been a fair bid, we submit, than the professed opinion of a witness who can qualify as an estimator, but who made his estimates solely for the purpose of testifying in a law suit and who was in no danger of being called upon to do the work at the figure testified to by him. Opinion evidence is the lowest and most unreliable form of evidence. If it was admissible in this case *a fortiori* should the actual costs have been admitted.

Authority for admitting actual costs as evidence of the fair and reasonable costs of doing certain work will be found in *Prudence Co. v. Fidelity & Dep. Co.*, 297 U. S. 198; *Bates v. Carter Construction Co.*, 255 Pa. 200, 209, 99 A. 813; *Burke v. Pierce*, 83 Fed. 95; *The Scythian*, 83 Fed. 1016; *The Lucille*, 169 Fed. 719; *The Rosalie Mahoney*, 297 Fed. 294; *Travelers Indemnity Co. v. Ply-*

mouth Box Co., 99 F. (2d) 218; *Sheldon v. Wood*, 15 N. Y. Super. Ct. 267, affirmed *sub nomine Byxbie v. Wood* in 24 N. Y. 607; *Lewis v. Utah Construction Co.*, 10 Idaho 214, 77 P. 336; *Union Water Co. v. Los Angeles*, 184 Cal. 535, 195 P. 55; *Bacigalupi v. Phoenix Building & Construction Co.*, 14 Cal. App. 632, 112 P. 892; *Portland Pulley Co. v. Breeze*, 101 Ore. 239, 199 P. 957; *Wiley v. Dean Land Co.*, 171 Ia. 75, 153 N. W. 145; *S. E. Express Co. v. Chambers*, 33 Ga. App. 44, 125 S. E. 507; and *DeMoville v. Merchants & Farmers Bank*, 233 Ala. 204, 170 S. 756. In *The Albert Dumois*, 177 U. S. 240, 255, this Court said that the original cost of a boat and the amount at which the owner had contracted to sell an interest therein were better evidence of the actual value of the ship "than the conflicting opinions of experts more or less friendly to the owner." While some of the above cases are contract ones, others are based upon torts, so that they cannot be distinguished by the generality that the rule for which we contend is confined to breach of contract cases.

Neither the District Court nor the relator has as yet cited any authorities for excluding the actual costs as evidence. This question of evidence should not be confused with the substantive rule for measuring the damages in this case, as the relator has been wont to do. Judge Schoonmaker's opinion contains no reasoning to show how he arrived at his conclusion that "The actual cost to defendants of doing the work can have no bearing on that issue" (R. 374). The issue referred to was whether the Government had been damaged (R. 374). If the prices specified in the electrical contracts in question were fair and reasonable, we submit, the Government sustained no damage. And whether those prices were fair and reasonable would be most persuasively proved by the actual cost of performing those contracts. The actual cost to respondents of doing the

work, therefore, does have a very forceful bearing on the issue. In other words, the respondents are charged with having made unreasonable profits on 48 jobs. To determine whether they did so, would it not be helpful to know how much profit (or loss in some cases) they actually did make on those projects?

The evidence which the trial judge refers to as having been introduced by the respondents to show that the bids submitted by them were fair and reasonable (R. 374), was merely the opinion evidence of a qualified electrical estimator of what a fair bid in open competition for each job would have been. The fact that the respondents were permitted to introduce some evidence on the question of damages, will not cure the error in excluding other competent evidence offered by them, particularly when the excluded evidence is of a higher probative value and might well have been convincing to the jury. As it was, the jury was left to choose between the opinions of two so-called experts, with nothing in the nature of actual facts to guide them.

We also submit that the evidence of the actual cost of performing the contracts was admissible for the purpose of mitigating the damages. The trial judge summarily rejected this argument apparently for the reason that the respondents were "wrongdoers" (R. 374). Nevertheless, the respondents did furnish the labor and materials required to perform their contracts and otherwise fulfilled their contracts without any complaint or deficiencies and valuable schools, municipal buildings, water treating plants and the like have been acquired by the local municipalities. We submit our case is analogous to *Smothers v. Cosgrove-Meehan Coal Co.*, 264 Ill. App. 488, in which a defendant who was held liable for wrongfully entering and mining coal was permitted to show the actual cost of loading and hauling the coal to the foot of the shaft and of hoisting and dumping it into cars in reduction of the damages.

VI.

Character Evidence Competent.

The respondents offered to prove by competent witnesses that their reputations for honesty, fair dealing and integrity and being law-abiding citizens was very good, but all such evidence was excluded on the authority of *Helvering v. Mitchell, supra* (R. 123-124). In his opinion denying the respondents a new trial, Judge Schoonmaker dismissed this question with a single sentence, stating in effect that this suit was for a civil sanction (R. 385). Whether character evidence is admissible in this case depends upon whether this suit is merely for a civil sanction or in part to recover a penal sanction. The $2,000 forfeiture and the double damages constitute, we submit, a penal sanction, intended for punishment and not only reparation. If so, character evidence was admissible and *Helvering v. Mitchell, supra,* is an authority in our favor.

A case directly in point, holding that a suit under R. S. § 3490 is for a penal sanction and, therefore, subject to the rules of criminal procedure, though the action is civil in form, and that character evidence is admissible in such a suit, is *U. S. v. Shapleigh, supra.*

In addition to the *Shapleigh* case, there are also *Olson v. Mellon, supra,* and the other cases hereinbefore cited (pp. 25-27) holding that R. S. § 3490 is penal in character.

Attention is called to our prior argument (p. 96) to show that this suit is in part at least to inflict penalties as punishment for illegal acts. We have also hereinbefore (pp. 93-94) attempted to show why the sanction involved in *Helvering v. Mitchell, supra,* was civil in character, and how it differs from the sanctions sought to be recovered in the case at bar.

VII.

Prejudicial Argument to Jury.

As a final reason for a new trial the respondents submit that the relator's counsel indulged in unfair, prejudicial and illegitimate argument in his closing address to the jury. In that address relator's counsel in substance argued that the respondents' plea of *nolo contendere* in the criminal proceeding was inconsistent with their attempt to escape liability in the case at bar and amounted to an admission of their liability in the instant case (R. 127-129). It is settled that the plea of *nolo contendere* cannot be used as an implied admission of liability in a subsequent civil action: *Tucker v. U. S.*, 196 Fed. 260, 262; *Ferguson v. Reinhart*, 125 Pa. Superior Ct. 154, 159, 190 A. 153. This argument of relator's counsel was, therefore, contrary to law. Obviously it was also prejudicial. Where an unfair argument such as this is made by counsel in his closing address to the jury a new trial should be granted: *N. Y. C. R. R. Co. v. Johnson*, 279 U. S. 310; *Connelly v. Pgh. Rys. Co.*, 230 Pa. 366, 79 A. 635.

This unfair argument of relator's counsel cannot, we submit, be justified by what respondents' counsel said to the jury. In opening respondents' case to the jury counsel told them that the respondents proposed to show that they had already been criminally prosecuted for the same offenses, that they had pleaded *nolo contendere* to the criminal indictment, had been sentenced and had paid the fines imposed upon them, and that they could not, therefore, be punished a second time for the same acts. That simply outlined to the jury some of the evidence which the respondents intended to offer and gave the jury the necessary insight to understand the import of the records in the criminal proceedings and Special Assistant Attorney General Andrews' testimony when

they were offered in evidence. That statement of defense counsel was, therefore, we submit, perfectly proper. In their closing argument to the jury, defense counsel simply explained why some of the promised evidence had not been introduced and added that no admission of liability was to be implied in the instant case from the fact that the respondents had pleaded *nolo contendere* in the criminal proceeding, which was based on different statutory provisions than the case at bar. We said that because the criminal proceeding had been several times alluded to during the trial and the newspapers during the protracted trial had often reiterated that the respondents had pleaded *nolo contendere* in the criminal case. We were, therefore, apprehensive that the jury might draw an improper inference from that termination of the criminal case. What we said was in full accordance with the law, i. e., that the plea of *nolo contendere* cannot be used as an implied admission of liability in a subsequent civil action. It is also correct that the indictment to which the respondents pleaded *nolo contendere* was drawn under § 37 of the Criminal Code (18 USCA § 88): the general conspiracy statute which does not require any pecuniary loss to the Government and is derived from R. S. § 5440. The other indictments were drawn under the 1934 amendment to § 35 of the Criminal Code (18 USCA § 80), which is materially different from R. S. § 5438 in that said amendment of 1934 extends § 35 of the Criminal Code to a misrepresentation in any matter within the jurisdiction of any agency of the United States. We submit, therefore, that there was nothing in what we said for relator's counsel to answer; that we did not thereby waive any rights; that the aforesaid arguments of relator's counsel were highly improper and prejudicial; and that the respondents are entitled to a new trial for that reason, if the judgment of the Circuit Court of Appeals is not affirmed.

VIII.

Only One $2,000 Penalty Recoverable.

Finally, if the judgment of the Circuit Court of Appeals were reversed and a new trial denied, we submit that only one penalty or forfeiture of $2,000 may be included in the recovery in any single case brought under R. S. § 3490. The verdict and judgment of the District Court in this case included $112,000 by way of penalties (R. 338, 389). R. S. § 3490 is quoted *ante*, p. 22.

It should be particularly noted that the statute does not say that the offender shall forfeit and pay $2,000 for each violation of § 5438. Attention is also called to the fact that the plural "acts" is used in the clause "who shall do or commit any of the acts prohibited by any of the provisions of section 5438", which means, as we interpret the language, that if the defendant commits one or more acts violative of R. S. § 5438, he shall in either event forfeit and pay "the sum of $2,000" and double damages. Moreover, in the last clause of R. S. § 3490 the singular "forfeiture" is used, which is not grammatical if more than one forfeiture can be recovered in the same suit. The forfeiture is also referred to in the singular in § 3492 and § 3493, in speaking of suits against offenders and how the recovery shall be shared (R. 408). In the same places the damages are always referred to in the plural. If it had been the intention of Congress that the $2,000 forfeiture shall be multiplied in each suit by the number of acts which the defendant had committed in violation of § 5438, the words "or forfeitures" or some similar language should have been inserted after the word "forfeiture". Under the strict construction which is to be placed upon the informer act, as held in *U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co. et al.*, and other cases, *supra* (pp. 25-28),

only one forfeiture of $2,000 should be allowed in each suit.

The first two points in the respondents' requests for instructions to the jury were as follows (R. 334):

> "1. If you find for the plaintiff, there can be only one penalty or forfeiture of $2,000 included in your verdict in this case.
>
> 2. Each defendant in this case can be held liable only for the damages, if any, which were sustained by the Federal Government on jobs on which that particular defendant bid or on which he refrained from bidding because of conspiring with others."

Both of the above points were refused. That refusal is complained of in the fifth and sixth reasons for a new trial (R. 341). We respectfully submit that both of those requests for charge could not consistently be refused; they are antipodal and either one or the other should have been granted.

The relator argued for, and the case was tried on, the theory that there was but one conspiracy involved in the case. Otherwise, much of the evidence would not have been admissible against all of the respondents. The refusal of the respondents' second point for charge quoted above and the fact that the trial judge in effect instructed the jury to return a joint verdict against all of the defendants, except such defendants as the jury might excuse altogether, could only be on the theory that there was but one conspiracy embracing the several projects and that each project did not constitute a separate conspiracy or offense. To be consistent, therefore, only one $2,000 forfeiture should be allowed in this case.

There is no practical or equitable reason for allowing $112,000 in penalties in addition to the double

damages. Under the informer act the relator is entitled to one-half of the damages, which half in this case if his judgment is sustained except for this point, will amount to over $100,000, and his costs. Is that not sufficient reward for him? The $2,000 forfeiture may have been intended for cases in which the damages were very small, so that one-half of them would not have compensated the relator. In such a case the $2,000 penalty would assure the relator of getting at least $1,000 in addition to his costs, but that does not apply to the case at bar in which the jury allowed $203,100.91 by way of damages.

We have found no case in which more than one $2,000 forfeiture was recovered under R. S. § 3490. We challenged the relator in the courts below to cite any such case, but still he did not do so.

No new trial is needed to correct this error. If we are wrong in every other argument, this error can be remedied by reducing the judgment by $110,000 to $205,100.91.

Conclusion.

To summarize, we respectfully submit that the judgment of the learned Circuit Court of Appeals is in accordance with law, public policy, right and justice and should be affirmed for any one or more of the following reasons: (1) there is no statutory authorization for this action; (2) to sustain a recovery in this action would subject the respondents to double punishment for the same offenses, which is contrary to law; (3) the sanction of the Commissioner of Internal Revenue and of the Attorney General is a condition precedent to the bringing and maintaining of such a suit as this, but in this case the sanction of neither has been obtained; (4) because of the specific maximum limitation in dollars and cents

upon each PWA grant there is not sufficient evidence by which any damages can be calculated or recovery sustained. If the learned Circuit Court of Appeals was wrong and if each and all of the reasons outlined above in this paragraph is unsound, then we respectfully submit that the respondents are entitled to a new trial for any one or more of the following reasons: (1) evidence to prove the actual cost of performing each of the contracts in question and that the actual costs were fair and reasonable and the lowest prices at which the work could be done in accordance with the contracts was competent and to exclude it was error; (2) character evidence is competent in such a case as this and to exclude it was error; (3) counsel for the relator in his closing address to the jury indulged in unfair, prejudicial and illegitimate argument. In any event, if the learned Circuit Court of Appeals was wrong and if we are wrong on each and every other question, we respectfully submit that only one $2,000 penalty is recoverable in a single action under R. S. § 3490 and that, therefore, the judgment of the District Court would have to be reduced by $110,000. We earnestly pray, however, that the judgment of the learned Circuit Court of Appeals be affirmed.

Respectfully submitted,

WILLIAM H. ECKERT,
EUGENE B. STRASSBURGER,
JOHN B. NICKLAS, JR.,
Counsel for Respondents.